IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 865 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
ASAFAFKHAN KALANDARKHAN & 2 - Opponent(s)

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Appearance :
MR KC SHAH, APP for Appellant(s) : 1,
MS AMEE YAJNIK for Opponent(s) : 1,
MR PS CHAMPANERI for Opponent(s) : 2,
MR EE SAIYED for Opponent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 26/12/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1. The present appeal is an appeal under Section 378 of the Code of Criminal Procedure, 1973 challenging the judgment and order of acquittal passed by the learned Additional Sessions Judge, Ahmedabad (Rural) at Narol dated 21.3.1986 in Sessions Case No.44 of 1985.

2. By the impugned judgment, learned trial Judge has acquitted all three accused from the charge of offence punishable under Sections 302, 120-B and 201 of Indian Penal Code and also from the charge of offence punishable under Section 25-A of the Indian Arms Act committing murder of deceased Firozbhai Abdul Latif by firing gun on the right side of his chest when he was in the motor car of accused No.3 and probably under the influence of alcohol in early hours on 21.2.1984.

3. Learned APP Mr.K.C.Shah has taken us through various grounds of challenge mentioned in para 4 of the memo of appeal as well as the judgment. In nutshell, the say of learned APP Mr.Shah is that

finding arrived at by the trial Court is based on erroneous appreciation of oral as well as documentary evidence available on record and some palpably wrong inferences have been drawn which can be said to be conjectures. The admissible and trustworthy evidence though available on record has been ignored conveniently by the learned trial Judge and while recording acquittal, the trial Court has mainly hammered on hypothesis of innocence of accused and even the learned trial Judge has held erroneously that the prosecution has not even proved that the death of deceased Firozbhai is homicidal death. It is wrongly observed that the death may be accidental. When it is not found proved beyond reasonable doubt that the death of deceased Firozbhai is homicidal death and not accidental death, it would not be legal for the trial Court to link all the accused with the crime punishable under Section 302 IPC or charge of criminal conspiracy. Mr.Shah has developed various points during his oral submissions and the arguments advanced by Mr.Shah have been responded by the learned counsel appearing for all three respondents (hereinafter referred as “original accused Nos.1, 2 and 3 respectively for short). Ms.Ami Yagnik has placed the case of accused No.1, Mr.Champaneri has

argued for accused No.2 and Mr.E.E.Saiyed made his submissions for accused No.3.

4. To appreciate the say and submissions made before us by the learned APP and the counsel appearing for the respondent accused persons, firstly, we would like to state the case of the prosecution in brief reflected from charge Exh.7. It is alleged that accused Nos.1 and 3 were knowing each other and they were friends of deceased Firozbhai and in the same way, accused No.3 was also knowing accused No.2 and accused Nos.1 and 3 had cordial and friendly relations with accused No.2. Deceased Firozbhai was dealing in the business of tyres of four wheelers and even motor-cycles and cycles. The accused No.3 was dealing in the business of sales and purchase of motor trucks and was also working as Broker in that field. The accused Nos.1 and 3 and mainly accused No.3 was helping deceased Firozbhai in his business of selling tyres and with the help and intervention or guarantee given by accused No.3, deceased Firozbhai was selling tyres to the traders and customers at Savarkundla, a town under the district Bhavnagar. The deceased was required to collect the dues from the customers as he was to pay

certain amounts to the supplier and so he was interested in early recovery of the amount due from the customers of Savarkundla. The accused nos.1 and 3 on 20.2.1984 had agreed to accompany deceased Firozbhai to Savarkundla sometime during afternoon hours. Deceased was keen to see that accused no.3, at least, accompanies him to Savarkundla to collect the dues from the customers as those tyres were sold on the request of or at the instance of accused no.3. It emerges from the evidence that tyres were sold at Savarkundla on credit and as per request of accused no.3 by taking some token amount in cash. The brother of deceased Firozbhai was serving with one cooperative bank and during the spare hours he was helping his brother deceased Firozbhai in his business. So, on the date of incident the deceased had told his brother Mohammed Usman his intention to go to Savarkundla with accused nos.1 and 3 for collecting dues from the customers and he had asked him not to go to the bank i.e., to his job on the next day so that he can attend the shop of his deceased brother Firoz. The shop of deceased Firozbhai was situated opposite New Cloth Market and at about 7.30 p.m., to 7.45 p.m., they closed the shop and deceased Firozbhai returned with his brother

Mohammed Usman to the residence. The residence of the deceased is in Navi Mohalat, Panch Kuva. In the evening, the deceased also informed his wife Banu Bibi about his intention and programme to go to Savarkundla and after taking meals, he left the home with the suitcase and as it was cold days, he had taken gloves and put on jacket. The deceased went to the shop of accused no.3 situated at Sarkhej road. The accused no.3 at that time, was found reluctant to go with the deceased but on the insistence of the deceased, accused nos.1 and 3 finally agreed and they started in fiat car of accused no.3. It is the say of the prosecution that the wife of the deceased initially requested the deceased not to go because of severe cold but she was asked not to worry because accused nos.1 and 3 were to accompany him and they were to go in the motor car. The deceased had left his residential house at about 8.30 p.m., or so. When the deceased had reached at the shop of accused no.3, accused no.1 was present there and at that time the proposal to proceed for Savarkundla placed by the deceased was not accepted. The accused no.3 tried to avoid the proposal but thereafter, all three i.e., deceased and accused nos.1 and 3 had left the shop in the car of accused no.3. The accused no.3 was driving

the car. When they were proceeding in this journey, on the way, they took petrol from the petrol pump of one Lalitkumar and then decided to proceed towards Bagodara. When they were on the way, it is alleged that suddenly the programme to go to Nal Sarovar was worked out and therefore, they had been to village Gangad and took accused no.2 with his muddamal gun. It was decided that, firstly, they will go for hunting at Nal Sarovar and then shall proceed to Savarkundla. They had waited and rested at the petrol pump and then they had started journey towards Nal Sarovar. On the way, when they were just near Nal Sarovar, deceased Firozbhai received gun shot injury from the muddamal gun. So, all three respondents – accused returned with injured Firozbhai as he was to be taken to the hospital. On the way, accused no.2 got down after giving some instructions to accused nos.1 and 3 with his muddamal gun. It is alleged that the accused persons, initially, had decided not to reveal true facts of the case. The accused nos.1 and 3 with the injured proceeded towards the V.S.Hospital and took the injured inside the hospital. It is the say of the prosecution that accused nos.1 and 3 had said to the hospital authority that some unknown persons have injured the deceased when they were

proceeding towards Savarkundla. The V.S.Hospital authority, therefore, informed the police personnel who is always there in the hospital known as “hospital duty police”. The hospital duty police in turn informed the Ellisbridge Police Station. The Ellisbridge Police Station immediately rushed to the V.S.Hospital and Investigation Branch of the Ellisbridge Police Station recorded the complaint of accused no.3. After the investigation, the police found that accused no.3 has given false information as to the place of incident. It was also found that the accused who had shot the deceased to death with gun was of accused no.2. The gun shot injury inflicted to the deceased was somewhere near Nal Sarovar. The complaint, therefore, was initially registered by the Ellisbridge Police Station and transferred to the Police Station having jurisdiction over the area indicated by respondent no.3 in his complaint. Mr.Kanpuri P.S.I., of Ellisbridge Police Station, before transferring the investigation to the concerned police station, visited V.S.Hospital as injured Firozbhai was declared dead. He held inquest panchanama and recovered muddamal articles which were with the deceased. The dead body, in turn, was handed over to the hospital for autopsy or postmortem

examination and during that time accused no.1 and 3, who were claiming to be the witnesses of the incident, had informed the close relatives of the deceased Firozbhai. The complaint has been registered by P.S.I. - Mr.Kanpuri. Mr.Kanpuri, P.S.I., took the car into surveillance, in the presence of panchas drew the panchnama, took out muddamal suitcase etc., from the motor car. He also sought for assistance from the F.S.L. The F.S.L., expert had reached the V.S.Hospital where the muddamal car was parked. The F.S.L., experts collected the sample in the presence of panchas. They also took chance-prints from the handle of the motor car. Other expert Mr.Thakore took the specimen of blood from the blood stained body of the motor car and thereafter, in the presence of panchas, hand-wash of accused nos.1 and 3 were taken by F.S.L., expert. From the deki of motor car, muddamal articles nos.17 to 31 were recovered. The clothes of the deceased were also recovered which were produced by the police constable. The samples collected from the motor car including hand-wash etc., were sent for analysis to the F.S.L. Thereafter, the offence was transferred to Umrala Police Station. P.S.I., Umrala Police Station found that the place of offence shown by accused no.3

(complainant of the FIR written by Mr.Kanpuri) as well as vardhi given by accused nos.1 and 3 to the hospital authority and/or hospital duty police was false and in reality the incident has occurred near Nal Sarovar in district Ahmedabad (Rural). The investigation was thereafter, handed over to the State Crime Branch. On investigation, the State Crime Branch had reached to the tentative finding that the incident had occurred at Nal Sarovar and probably it was accidental fire. So, the police was preparing for filing of the charge sheet of the offence punishable under Section 304-A of Indian Penal Code. As the widow of the deceased Banu Bibi was worried about the investigation concerning to her husband's death, approached the higher-up by written application and the formal complaint immediately came to be registered. On the complaint received from Banu Bibi for the offence punishable under Sections 302, 201 and 120-B of the Indian Penal Code, the police immediately found that deceased Firozbhai was murdered and the accused persons have tried to play with the evidence and ultimately all three accused came to be charge sheeted for those offences in the Court of Chief Judicial Magistrate, Dholka having jurisdiction over the area where deceased Firozbhai

was inflicted with the gun shot injury.

5. To prove the charge, the prosecution has examined number of witnesses and has produced various documents including the opinion expressed by the expert and the medical evidence. The police has also collected certain evidence by drawing panchanama and collecting the documents from the government office so as to prove the occupancy and ownership of the motor car, the muddamal rifle and other transactions that had taken place between the deceased and accused nos.1 and 3 on different occasions. It has also come on record that on 20th February i.e., the day on which both accused nos.1 and 3 proceeded towards Savarkundla for recovery of the dues, accused no.1 and deceased Firozbhai had been to a bank from where accused no.1 had taken the loan against his fixed deposit amount and that loan amount was settled by paying some amount in cash.

6. The witnesses examined by the prosecution can be categorized in three parts, i.e.;

(i) Expert witnesses or witnesses who have given opinion evidence;

(ii) Witnesses examined to prove the basic facts pressed by the prosecution. In this category, witnesses can be further divided in two parts, i.e., (a) who are capable of establishing some facts by leading their original substantive evidence and (b) Panch witnesses who have been examined to prove the panchnama drawn during the course of investigation; and

(iii) The police witnesses.

7. In the judgment under challenge, learned trial Judge has referred 12 major circumstances and it is observed that the prosecution has not successfully established some of these 12 circumstances beyond doubt, which makes the case of the prosecution doubtful and proved circumstances are not capable to establish the link between the accused and the crime, because in the case based on eight circumstantial evidence, proved circumstances or circumstance should be sufficient to establish crime and it is also necessary to establish that they are inconsistent to the innocence of the accused. “May”

or “might be” cannot take the prosecution to any favourable end and suspicion however strong it may cannot take place of proof. So, when the prosecution has not proved about four circumstances out of 12 satisfactorily by leading cogent and legal evidence, the accused deserve benefit of doubt and it is likely that gun shot injury found on the person of the deceased may be accidental. Learned trial Judge has found that the prosecution has not even satisfactorily proved that the death of the deceased is homicidal beyond doubt.

8. The say of the learned APP is that this Court, while dealing with the appeal against the order of acquittal, can reappreciate the entire set of evidence available on record and can replace its own reasons even while confirming the acquittal or reversing the same. Considering the scheme of Sections 378 and 386 of the Code of Criminal Procedure (hereinafter referred to as `Code'), there is no embargo in reappreciating the evidence. As per the settled legal position, only for the sake of replacing other alternative probable view the Court, dealing with acquittal appeal, should not assign its own reasons. The Court can positively reach to the

conclusion that the view taken by the trial Court while acquitting the accused is erroneous and/or is based on palpably wrong appreciation of evidence. It is not possible for us to agree with the argument advanced on behalf of the respondents accused that while dealing with the appeal against the order of acquittal, this Court cannot and should not reappreciate the evidence and replace its own finding.

9. According to Mr.Shah very mistake has been committed by the learned trial Court in recording the finding in reference to four major circumstances out of 12 narrated in para 22 of the judgment under challenge. For the sake of convenience, we would like to state 12 circumstances canvassed before the Court. Of course, it was argued by the learned APP appearing in the matter that all these circumstances have been established beyond doubt.

(A) Decision by accused no.1 and accused no.3 and late Firozbhai to proceed to Savarkundla for collecting the amounts due on credit sales effected by late Firozbhai to various customers of Savarkundla and nearby

areas through accused no.3.

(B) Disclosure of intention by late Firozbhai to his family members Mahamad Usman and Banubibi to go to Savarkundla in the motor car owned by accused no.3.

(C) The accused no.1, accused no.3 and late Firozbhai at night about 8.30 p.m., to 9.30 p.m., started from the shop of accused no.3 in the car of accused no.3.

(D) At the petrol pump of Lalitkumar at Sarkhej the petrol was taken and the presence of accused no.1 and accused no.3 with deceased was there.

(E) At Bagodara they took petrol from Bagodara petrol pump.

(F) At village Meni near Nalsarovar, blood stained clay and control clay were taken. Empty case of used cartridge recovered from Kala Mera.

(G) Motor car wheel mark and ownership of

motor car of accused no.3.

(I) Presence of accused no.1 and 3 at V.S.hospital.

(H) Rifle was owned by accused no.2 and its licence in his name.

(J) Hand wash of accused nos.1 and 3 taken.

(K) Nitrate was in handwash of accused no.1.

(L) False vardhi-complaint of place of offence at Vallabhipur Dhasa road.

10. After appreciating the evidence of PW 2 – Exh.16 Banubibi Firozbhai who has proved the letter written by her and addressed to Shri Bhaya, senior most Police Officer, CID Crime Branch of State of Gujarat dated 14.8.1994, PW -3 Mohammad Usmanbhai Havavala, brother of the deceased who has also proved the documents pertaining to the sale of tyres at the intervention of accused No.3 Exh.20, 21 and 22 and PW 25 – Aiyub Allarakha Exh.68 who is the employee of

accused No.3 and PW 20 Fakruddin Lalumiya Exh.58, employee of deceased Firozbhai, learned trial Judge has held that the prosecution has proved circumstances “A” and “B” beyond doubt and the discussion has been made by the learned trial Judge in paras 23, 24 and 25 of the judgment. It is also observed by the learned trial Judge that it is also proved by the prosecution witnesses beyond doubt that deceased Firozbhai was to leave for Savarkundla on the night of 20th for collecting debts in respect of credit sale and he was to go in the company of accused Nos.1 and 3 in the car of accused No.3. He had started from his house with muddamal articles, briefcase and had put on muddamal bu-shirt, jacket recovered from the dead body, shoes and socks and had left about 8.00 p.m., and 8.30 p.m. The circumstances – “C” is also found established by the learned trial Judge whereby it has been held that accused No.1 and accused No.3 and late Firozbhai at any time about 8.30 p.m., to 9.00 p.m., had started from the shop of accused No.3 in the car of accused No.3. Learned trial Judge has found that the case of the prosecution has been strongly supported by PW 24 Salimbhai Rehmatkhan Exh.67 who was employed in one Travel Agency and PW 25 Aiyub Allarakha – employee of

accused No.3 (Exh.68). This witness Aiyub Allarakha is the son of sister of accused No.3 and also employee of accused No.3. This is not the reason for PW 25 – Aiyub Allarakha to implicate his own master or relative in a serious crime and that too help the family members of deceased Firozbhai. The accused No.3 is the maternal uncle of this witness and was getting salary of Rs.400/- per month. This witness has stated that he used to open shop of accused No.3 and he had been to shop of accused No.3 at about 8.00 a.m., and 8.15 a.m., on 20th for opening of shop. It is proved by this witness that fiat car of accused No.3 was required to be sent for repair to the mechanic. He and the mechanic had been to the City for testing the car and the plain reading of the evidence reveals that he was, at the relevant point of time i.e., about 7.30 p.m., onwards, at the shop. It is stated by this witness that accused No.3 had returned to the shop between 8.00 p.m., and 8.30 p.m. During this period, there was telephonic message from deceased Firozbhai and Firozbhai was telling him that they were to go to Savarkundla. At that time about 9.00 p.m., when this witness has stated without any material contradiction or without making any material improvement that deceased Firozbhai had started for

Savarkundla with accused Nos.1 and 3 in the fiat car of accused No.3 at about 9.45 p.m., his version was required to be accepted and according to us, it is rightly accepted by the learned trial Judge. On careful consideration of oral evidence of these witnesses, we are also of the view that in absence of any material contradiction vis-a-vis the police statements and in absence of any material improvements which can be said to be modulation, the finding of the learned trial Judge in reference to circumstance – “C” is legal and it is correct finding.

11. Circumstance “D” is held to be proved. Circumstance “E” is not established. Circumstance “F”, the prosecution failed to establish Circumstance “F” totally. Circumstance “G”, the prosecution has established Circumstance “G” partially. Circumstance “H” is established. Circumstance “I”, the prosecution has not established Circumstance “I” beyond reasonable doubt. Circumstance “J”, the prosecution has established Circumstance “J” beyond doubt that hand-wash of accused Nos.1 and 3 were taken and also that mudguard of the motor car was found with clay of the place of incident.

Circumstance “K”, the circumstance of the presence of nitrate is established so far as accused No.1 is concerned and the controlled clay taken from the place of village Meni was identical with clay found on mudguard of the motor car. Circumstance “L”, the prosecution has failed to establish Circumstance “L” that accused No.3 gave false vardhi information as per Exh.73 and gave false complaint Mark 12/2 and shown the place of offence as per Exh.77. Circumstance “L” is also not proved by the prosecution.

12. Learned trial Judge, after discussing the evidence oral as well as documentary, has held that the prosecution has satisfactorily established that at the petrol pump of Lalitkumar at Sarkhej, petrol was taken and the car was fueled and at that time, accused Nos.1 and 3 were there in the car with deceased. It is also held proved that one more important circumstance that accused No.3 is the owner of muddamal car and the deceased along with accused Nos.1 and 3 had left for Savarkundla in that car. However, learned trial Judge has observed that the prosecution has not proved that wheel marks of that car were there at the spot of the alleged incident or

area at village Meni, but the conflict in the evidence as to the photographs of the tyre marks found on the earth and the actual design of the tyre compared by the FSL Expert whether has been properly appreciated is the question posed before us in the present case and the question also requires to be addressed that what could be the ultimate effect of this conflict in the evidence qua tyre marks on the merit of the case.

13. Learned trial Judge has held that muddamal 12 bore gun was of the ownership of accused No.2 and he is also having licence to possess that gun. The finding recorded qua circumstance “H”, according to us, requires some appreciation especially the stand taken by the accused is that the deceased received gun shot injury accidentally. This circumstance is required to be evaluated that when accused Nos.1 and 3 had to accompany the deceased to Savarkundla for recovery of the dues, what promoted accused Nos.1 and 3 to give lift to accused No.2 in the motor car and that too with the licenced gun. The defence theory placed by the accused and accepted by the learned trial Judge of accidental fire develops important circumstance and that the circumstance of use of gun

which would not lie in the mouth of accused that too after written explanation given by accused No.3 in response to the question asked by the trial Court while recording the statement under Section 313 of the Code that the deceased has not sustained injuries because of muddamal gun. The case of the prosecution is that the injuries caused to the deceased were intentional and on the other-hand, the say of the accused as emerging from the evidence and cross examination of the witnesses done by the advocate appearing for the defence side that the same was accidental. Learned trial Judge has held that the circumstance “J” has been satisfactorily established qua accused No.1. It is held by the learned trial Judge that hand-wash of accused Nos.1 and 3 were taken by the FSL Expert on the day of incident and that too in the V.S.Hospital when they brought the deceased in the V.S.Hospital in the very motor car and the finding arrived at by the FSL Expert is correct and genuine wherein it is stated that hand-wash sample of accused No.1 shows the presence of nitrate. It is also held by the learned trial Judge that the Investigating Agency has collected clay (earth) from the place of incident of village Meni. It was taken as controlled sample and clay sample

drawn from mudguard of the muddamal car owned by accused No.3 and allegedly driven by accused No.3 at the relevant point of time tallied each other. The version of PW 31 Circle Police Inspector Mr.Jhala has been accepted by the learned trial Court and keeping in mind the other evidence, it is held that the controlled clay taken from the place of village Meni was identical with clay taken from mudguard of the motor car.

14. According to us, when the learned trial Judge has held that two important circumstances i.e. Circumstances “J” and “K” have been satisfactorily established, the entire set of evidence needs careful evaluation because the other above mentioned circumstances also have been found established beyond doubt. It is true that hand-wash of accused No.3 does not show the presence of nitrate and there is conflict in the evidence as to the design in the tyre marks found at the spot in the sim of village Meni and tyres that were analysed and compared by the FSL after lapse of some days. The conflict found in this part of evidence gets substantial relation because muddamal car was sent for comparison of wheel marks vis-a-vis tyres that were there on the motor car

after the lapse of some days. No weightage can be given to this small conflict in the evidence especially when it has been held by the learned trial Judge that too rightly about the similarity found in the controlled clay taken from the place of the alleged incident and the clay found on mudguard. More scientific evidence by this set of evidence was very much there before the Court. It is not the say of the prosecution that the photographs of the wheels of the motor car itself were taken when the car was very well there in the VS Hospital and on the day of incident, the deceased was brought to the hospital. On the contrary, some piecemeal type of investigation appears to have created contingency or conflict when the motor car was taken for test ride for assessment as to the average kilometers run per one liter petrol and for other tests before the FSL Expert. When accused Nos.1 and 3 were dealing in the transport business i.e., in selling second-hand truck and other allied business, it was not impossible for some body interested in result of the case to play with this part of evidence. One can change the tyre marks of the spot or can change tyre because for many days, the accused persons and especially accused No.3 was enjoying the status of the complainant. It is in his

evidence that at the instance of the accused persons, Umrala Police had entered into the investigation. Learned trial Judge has reached to the conclusion that disclosure of the offence made initially before Ellisbridge Police Station, Ahmedabad by accused No.3 is not genuine or false and thereafter only the investigation had started taking a different turn. We are conscious that the Court should not draw inference unless it is legally permissible and finding should not be on conjectures, but legitimately on the strength of the nature of evidence and other circumstances, the Court can positively draw certain inferences while attributing weightage to the evidence and deciding impact of such evidence on merits. We would like to substantiate our inferences by stating the following facts.

(1) The evidence collected by the prosecution that no incident as alleged in the initial discloser made before the Ellisbridge Police on 21.2.1984 has been found satisfactory and it has come on record that no marks of violence or even the presence of tyre marks or motor wheels were found at the place suggested which is there at the distance of 11 kms from the village Umrala. Of course, the panchas have

not supported the panchnama drawn by the prosecution. However, learned trial Judge has accepted this preposition on the strength of the evidence led by the police witnesses. The fact that the deceased had sustained injuries is not the result of criminal wrong committed by third unknown person / persons is found undisputed. Of course, the prosecution is supposed to prove its case independently ignoring the weakness in the defence, but the learned trial Judge when was supposed to appreciate that the deceased Firozbhai sustained injuries at the instance of any of the accused person or persons or because of accidental fire, there was no need to have any evidence on collection of tyre marks at the place situated under the Police Station.

(2) The document Exh.79 has been tendered by the Circle Police Inspector Mr.Jhala in the evidence. It is forwarding letter addressed to the Forensic Science Laboratory and there is no challenge as to the contents of the letter. Vide letter Exh.79 earth collected in the presence of the panchas was sent to the Forensic Science Laboratory wherein the Expert was requested that earth collected be compared with the clay and earth lying with the laboratory that

were sent through the Ellisbridge Police Station on 22.2.1984. It is in the evidence that on 21st instant along with other samples drawn / taken out from the motor car lying in the compound of the VS Hospital, Ahmedabad earth / clay sticked on the left side door from where a person can get into the car and from the bottom of the car were collected as sample and it has been established that specimen earth collected from the spot of the incident i.e., from the sim of village Meni near Nal Sarovar are similar. The document Exh.109 is the opinion whereby the Expert has stated that earth / clay found under the radiator and both left and right brackets were on jack to lift the car is normally fixed beyond the hand-break bracket and gear box cross are similar to Exh.1 i.e., sample sent for analysis by Mr.Jadav. This test analysis was made visually and by doing particle size distribution and doing density gradient test along with microscopic examination. This finding is the inference of Expert who has applied accepted principles of Physical Science. So, once this muddamal car had gone to the spot where as per the prosecution the alleged incident had occurred. This evidence is more trustworthy and convincing because samples were already drawn on 21.2.1984 when one of

the accused was informant and there was no iota of doubt that any of the persons who had brought the injured Firozbhai to the VS Hospital probably may be found involved at the end of investigation.

(3) PW Pankajbhai Bhavsar when has said that the motor car bearing No.5593 had been to his Petrol Pump and 24 liters of petrol was loaded in that very car on 20.2.1984 whose version has been accepted by the trial Court is indicative of one fact that the car of the accused has proceeded in the direction of Savarkundla and the place of incident is also in the same direction. The involvement of the car in the incident is not disputed.

(4) The photographs of muddamal motor car wheels were taken by the Police Photographer on or about 12.3.1984. The forwarding letter Exh.85 reveals that Inspector Mr.Jhala decided to take photographs of the wheels of the motor car and they were taken while taking the wheel marks by adopting casting procedure. The wheel marks of the motor car were taken in the presence of Finger Expert. So, time gap between 20/21.2.1984 and 12.3.1984 is one of the factor before giving any weightage and resultant effect of

the opinion expressed by the FSL Expert.

(5) An attempt to magnify dissimilarity found in the wheel marks vis-a-vis photographs taken by the police in the month of March 1984 is not required to be given any weightage because prior thereto the car was moving from one Police Station to the another and one Investigating Officer to the other. Once it was also sent to the Forensic Science Laboratory in March, 1984 (Exh.95) to ascertain storing capacity of petrol tank and running average per liter petrol. It was also sent to analysis and to ascertain that how much petrol was lying in the tank. These attempts are genuine and objective to link the muddamal car with the incident, but when blood stains and other muddamal articles recovered from the motor car along with the presence of nitrate from the car and reliable piece of evidence of similarity of earth as discussed vis-a-vis existence of fact by one of the accused that they had been there at Nal Sarovar for the purpose of hunting / shikar, this dissimilarity does not destroy the strength of the case of the prosecution.

15. The map of the scene of offence prepared by

the Investigating Agency Exh.49 is an admitted document. The endorsement made by the defence counsel on the document list dated 11th December indicates that the map drawn by the Circle Officer, Bavla positively indicates the details of surrounding fields and also the place where the sample of clay / earth was collected. There was no express reason to take the motor car at the place shown in the map Exh.49. It is the say of the defence that as it was decided to go for hunting, the car was taken to Nal Sarovar. It is not a matter of dispute that otherwise the deceased along with accused Nos.1 and 3 were to proceed towards Savarkundla for recovery of the dues. It is true that the prosecution witnesses have accepted that the deceased had gone for hunting for more than one occasions, but nothing is brought on record during the course of cross examination of the brother of the deceased or complainant's wife that the visits for hunting of the deceased were frequent and he was normally going towards Nal Sarovar area for the purpose. The moot question which was required to be addressed by the trial Court was that when the group on the next date morning was to proceed towards Savarkundla whether they would have preferred to go for hunting before completing

the work of recovery after some good recovery or even after failure in getting the adequate amount from the debtors. On return, they may ought to have gone for hunting so that they can bring the result / hunt to the respective homes. Nobody normally would prefer to carry the dead body either of Rat or Duck or any bird like Crane. The Court is conscious that no judicial notice can be taken of the fact unless it is permissible by law, but the Court can positively take notice of one fact that days were cool and it was winter. It is in evidence that, therefore, only the deceased had started his journey with jacket and hand gloves etc. It is known fact that migratory birds are visiting Nal Sarovar in Winter season and thousands of visitors are going to enjoy the presence of migratory birds coming to India and at Nal Sarovar, in these days the Forest Department is placing number of guards, so that migratory birds are not disturbed by the visitors and such visits are more enjoyable in early hours of a day before sunrise or in the later part of the day i.e., at the time around sunset and thereafter, it was the duty of the Investigating Officer to bring this aspect on record. The statement of the responsible Forest Officer on duty at Nal Sarovar also could have been recorded.

For want of this part of evidence, we are not inclined to consider this aspect either in favour of the prosecution or against the prosecution. The fact remains that it was winter and without any help of anybody who is known to the local area, such visit normally would not have been paid by the group of the accused including the deceased. It is not an admitted position that the deceased had ever visited Nal Sarovar with any of the accused persons for the purpose of hunting. The company of the deceased for such programme appears to be with different persons and they have been named by more witnesses i.e., wife of the deceased and brother. This aspect ought to have been considered by the Court in its correct perspective when the positive say was brought by one of the accused before the Court as a plea of defence that the deceased accidentally sustained injuries by muddamal fire arms. We will deal with the aspect that what would be the effect of the statement made by one of the co-accused before the Court or during his examination under Section 313 of the Code or as a witness during the course of trial on the strength of the case placed by the prosecution or on the defence taken by the other accused persons.

16. The report of the Forensic Science Laboratory Exh.32 dated 16.4.1984 reveals that firing must have been done within the distance of two feet. During the course of cross examination of the Doctor who has performed autopsy, it has come on record that firing must have been done within the distance of one or two feet. If the gun was inside the car along with the deceased and more than one persons were in the rear seat of the car, whether the distance between the gun and the deceased could be of one or two feet is a question. The gun is before the Court. It was possible for the trial Judge to see length of the gun. The presence of nitrate found on the door by the FSL expert is sufficient to infer that the gun must have been fired when the deceased was inside the car. The FSL report of the expert who had examined the car that the glasses of the motor car including the glass of window were found broken. Exh.102 – report from the FSL (Toxicology Division) dated 27.4.1984 reveals that blood of the deceased sent for examination about 5 ml that it had ethyl alcohol 24.07 mg % w/v blood was sent for analysis with a request for detection and estimation of alcohol. What could be the physical condition of a person including mental and physical stability was also a question

which was required to be addressed by the trial Court while accepting the say of the accused or inferring that fire from the gun might be accidental. The theory of accidental fire when sustainable was a question before the trial Court. Learned trial Judge ought to have considered that in any of the hand gloves of right and left hand residues of fire ammunition are present or not. Exh.32 FSL report states that on any of these two hand gloves “residues of ammunition could not be detected on these exhibits”. It is further submitted by the expert that “burn marks of Exh.P1 right hand gloves do not appear to have been produced by the gun powder”. When the FSL expert was able to detect the human blood on both these hand gloves, it was not possible for the Court to infer that the gloves must be lying somewhere else than the hands of the deceased or they might be even in the suitcase. On one hand, this fact situation was there before the trial Court and on the other-hand, hand-wash of one of the accused, as mentioned earlier, shows the presence of nitrate, on the middle portion of the back side seat and on the inner side left side rear door glass (Exh.36), along with the presence of nitrate on the door of the car. Whether theory of accidental fire could have

been accepted or could have been formulated by the learned trial Judge on the strength of the set of evidence? Our answer to this question is in negative. This is one of the material errors leading to perverse or erroneous finding and this error, according to us, shall have material impact on ultimate finding that may be arrived at.

17. It is said that better late than never. The Investigating Officer could have asked the FSL expert to ascertain the capacity of petrol tank and its average running per liter. On verification, the FSL expert had found 19 liters of petrol in the motor car. It is also opined by the expert that the muddamal motor car had petrol tank of the capacity of 35 liters and it was found that average per liter on the tar road or asphalt road was of 12 kms. In the city area, average was 9 kms per liter and on kachcha road, average was found 7 kms per liter. At two places, the car was fueled, firstly, 24 liters of petrol at the petrol pump of M/s Lalitkumar Jagjivandas (Exh.51) was fueled, but there is no documentary evidence to show that second time the car was fueled. It is the case of the prosecution that the group of the accused along with the deceased had

made halt at the petrol pump of one Meghjibhai. The petrol pump is known as “Bansidhar Automobiles”. It is alleged by the prosecution that at about 3.00 the motor car had come and in that motor car, accused No.2 Sarpanch of village Gangad was there along with other persons. This petrol pump is located at Bagodara Dholka Cross Roads. The Court can positively take judicial notice of the distance of Bagodara Dholka Chokdi from the city of Ahmedabad or Sarkhej because the same is located on the National Highway 8A. The passengers of fiat car unless had stopped or made special stay somewhere would not take more than 3 to 4 hours for reaching at the petrol pump i.e. Banshidhar Automobiles, but it is the say of the prosecution that before the car had reached to that Banshidhar Automobiles petrol pump, accused No.2 had already boarded the car. There is no evidence on record to show the distance of village Gangad where accused No.2 is residing from Banshidhar Automobiles. The Court can also take notice of one fact, that is, the distance between Ahmedabad or Sarkhej and Nal Sarovar which is known as “Entry Gate” for the persons coming from Kachchh and Saurashtra direction of Gujarat. Nal Sarovar is the natural water reservoir having area of 116 sq.kms and from various

places, one can reach to Nal Sarovar. An admitted document Exh.49 vis-a-vis other evidence is sufficient to establish that the car driven by accused No.3 had moved towards Nal Sarovar from the road abutting on National Highway 8-A proceeding towards Limbdi from Ahmedabad. Considering total capacity of petrol tank of muddamal car and available petrol that had remained inside the tank is sufficient to indicate that the car must not have moved more than 100 to 175 kms. The accused Nos.1 and 3 had brought the injured to the VS Hospital at about 10.00 a.m. If the deceased had sustained injuries accidentally, whether any buzam friend and / or business associate would take 4 to 5 hours in reaching to the hospital with the injured friend was a question before the trial Court while appreciating the case of accidental fire. As per the map, distance between Sarkhej and Nal Sarovar if the same is approached through the National Highway 8-A would be about 75 - 80 kms. If the friend had gone to village Gangad so that accused No.2 can join them with his gun so as to use the same for hunting. Even though the distance would not exceed 95 - 98 kms and any of the friends would not try to divert the car in the direction other than hospital. The conduct,

therefore, of the accused persons after the injuries sustained by the gun fire by the deceased was also a question which was required to be addressed by the trial Court and according to us, no such attempt has been made and that has resulted into other gross material error leading to erroneous or perverse finding.

18. PW 14 Pankaj Bhavsar has supported the case of the prosecution substantially and when there is no cross examination of this witness that the car owned by accused No.3 was fueled at the petrol pump where he was on duty and he is the person who had prepared bill Exh.51, then version of this witness ought not to have given any lesser weightage, because he had also named the person who had fueled the car with 24 liters of petrol. The bill Exh.51 bears the number of the vehicle being 5593 which has been satisfactorily proved by this witness. This car bears the number, of course, no series is mentioned in the bill, but the location of the petrol pump reflected in the bill Exh.51 i.e., on National Highway 8-A on Sarkhej road and the date of bill i.e. 20.2.1984 is sufficient to draw inference that non-mention of series of the motor vehicle would not make

the case of prosecution doubtful on this point because involvement of this very car in the incident has remained undisputed. Even, the owner of the car accused No.3 has not stated anything qua evidence led by PW Pankaj Bhavsar. This witness has not stated that he has seen accused No.3 in the car at the relevant point of time, but when accused No.3 himself has accepted that petrol was purchased from that very petrol pump and the amount of petrol was paid by Firozbhai and the bill was kept by him strengthened the case of the prosecution that visit of all three i.e., accused Nos.1, 3 and deceased was at the instance of deceased Firozbhai. Therefore, probably he must have kept the bill with him. The recovery of this bill is genuine by the Investigating Agency. The person who had fueled the car Mustafa Yakub has proved that accused No.3 had brought that car, means he was driving. This PW 17 has satisfactorily established the identity of accused No.3 and he has claimed in his deposition Exh.54 that he was knowing accused No.3 since 5 to 6 years. It is stated by this witness that the car was fueled to its capacity. This witness also knows because of his experience that normally fiat car has petrol tank of the capacity of 45 liters and in the new model capacity

was of 35 liters. So, it was not possible for other accused persons to state anything contrary to the say of accused No.3 in his statement under Section 313 of the Code. It has come on record through the evidence of this witness and other witnesses that two persons were sitting in the rear seat of the car. The crucial question that would be front seat whether was purposefully kept vacant so that somebody can get into in that seat beside the driver or two friends have conveniently occupied the rear seat leaving the owner of the car on the driver seat. This witness PW 17 Mustafa Yakub has stood the test of cross examination.

19. As mentioned earlier, very sufficient and cogent evidence as to the ownership of muddamal double barrel gun is there and there was no reason for the Court to record the finding contrary to the allegations made by the prosecution that accused No.2 is the owner of muddamal double barrel gun and on analysis, it was found that this very gun was used. The use of gun is also not disputed. On close reading of the entire set of evidence, it appears that perhaps no specific defence was taken by the accused till some number of witnesses were examined,

but the Court is not concerned and the settled law is that even the theory of self defence is emerging from the set of evidence led by the prosecution or any other defence plea is alternatively probable and the fact submitted that the prosecution has not successfully established the case beyond reasonable doubt, there was no reason for the deceased to commit suicide and it was never suggested to any of the witness that under the mental pressure or financial crunch the deceased had committed suicide. On the contrary, the deceased was going for recovery of the amount and he had no reason to distrust accused no.1 or 3 who were accompanying the deceased in the process of recovery. It is in evidence that accused no.3 was the key person because the tyres were sold to the customers at Savarkundla mainly at the instance of accused no.3. It is not the finding of the learned trial Judge that the deceased might have committed suicide nor it was submitted before the Court nor this plea was taken. It is not possible for this Court even to consider about this plea of suicide by the deceased because of his conduct immediately prior to the incident and his act of accompanying accused no.1 in clearing the bank loan taken by accused no.1 (P.W.9 Exh.43). He was true

businessman and was ready to help his friends or business partners and also to take reasonable good advantage of such relationship in developing his business because it is in the evidence that he was selling tyres to the customers at Savarkundla by accepting about 50% amount and giving credit of remaining amount on recommendation of accused no.3. There are documents Exhs.20, 21 and 22 which have been proved by the prosecution and it clearly mention that the credit to the customers against the purchase of tyres was given at the instance of accused no.3. On the contrary, during the course of cross-examination of the brother of the deceased and widow of the deceased, it has been brought on record that actual debtor was not accused no.3. But, as the credit was given to the customer at the instance of accused no.3, he was put under the obligation to pay the amount being ultimate responsible person for writing recommendation. Of course, there is nothing in evidence which can be said to be clear but as per the normal practice a person intervening or who recommends to give credit in the business transaction assumes the status of guarantor may not be in legal sense but as per the business moral and therefore only deceased Firozbhai must have put pressure on

accused no.3 to accompany him to Savarkundla for recovery of outstanding amount.

20. The conduct of accused no.3 initially of giving assurance to accompany the deceased to Savarkundla for the purpose and reluctant that had developed prior to some hours from the actual time of departure for Savarkundla is very crucial and important piece of evidence and that has come on record through the evidence of P.W.5 Exh.25 Kanubhai Madhubhai, P.W.20 Exh.58 Fakruddin Lalumiya, P.W.24 Salimbhai Rehmatkhan and P.W.25 Ayub Allarakha and one of them i.e., P.W.25 is the employee of accused no.3. This witness has stated in paras 2 and 3 of his deposition that motor car involved in the incident was sent to the mechanic and when it came back, he had gone in the very car with the mechanic in the city i.e., Ahmedabad. The mechanic was driving the car, thereafter, they have gone to the shop of deceased Firozbhai and the deceased was there in his shop and accused no.1 Ashrafkhan was also there. This witness was knowing deceased Firozbhai since about two years and they were purchasing tyres, from the deceased meaning thereby, as the employer (accused no.3) because he has stated in vernacular that, “ame

tayro leta”. He has also stated that he also knows accused no.1 because his employer accused no.3 had given car to accused no.1 and he had been to Sarkhej to take that car. The deceased was asking accused no.3 to accompany him to Savarkundla for recovery of the debt amount. Ismailbhai i.e., accused no.3 was saying no to him because he was busy for two-three days. It is also stated by this witness that as the car was troubling while changing gear, it was sent to mechanic and it was taken in the city of Ahmedabad for test drive on 20.6.1984. The deceased had come to the shop of Ismailbhai accused no.3 at about 9.00 p.m., and Ismailbhai responded that we may not go because of cold and we may start in the morning. At that time, deceased Firozbhai had insisted that they should proceed and he has come with necessary clothing, at that time, accused no.3 had told that deceased Firozbhai should stay over in the guest house and they may start in the next morning but deceased Firozbhai had insisted to start at the earliest. Thereafter, accused no.3, deceased Firozbhai and accused no.1 Ashrafkhan left in fiat car bearing no.5593 of accused no.3. Accused no.3 was driving the car. After that, this witness has stated that thereafter he had closed the office and went to

his home. This witness has stated that on 21.2.1984 he has received telephonic call from accused no.3 at about between 9.00 to 9.30 and he was asked to reach Vadilal hospital with Salim. His employer accused no.3 had also informed him that he should go to the house of Firozbhai and they should inform that Firozbhai is very serious. This message was to be given to the brother of the deceased Firozbhai. This witness has been cross-examined at length and it has come on record that his employer Ismailbhai is also his maternal uncle, Salim is not his relative. He has said that he has earlier visited the shop of Firozbhai on 10 to 12 occasions and he has denied the crucial suggestion that Ismailbhai- accused no.3 along with deceased Firozbhai and Ashrafkhan were going towards Nal Sarovar for the purpose of hunting the birds or for catching fish. This part of the evidence was required to be kept in mind while developing the reasons that there was no evidence as to motive and as the deceased was friend of accused no.1 and 3 and has no direct animosity with accused no.3, gun shot injury sustained by the deceased may be accidental.

21. Learned trial Judge also has not considered

that the amount against the fixed deposit was taken by accused no.1 and the deceased had played some role in this loan transaction on 20.2.1984 i.e., on the date on which the deceased had left with accused no.1 and 3 for Savarkundla. The accused no.1 and deceased had gone to the cooperative bank and by paying some cash, the loan account was settled. Of course, the statement of bank which could have been obtained by the investigating officer and could have been tendered in evidence under the relevant provisions of the Indian Evidence Act but it is not possible for the defence to argue that there is no investigation in that direction. On the contrary, the figures of outstanding of the loan taken by accused no.1 and it is settled on 20.2.1984 were before the Court vide mark 12/54. This document has been proved by P.W.9 Abdul Kadarbhai Chandabhai Vepari. He has identified accused no.1 who had settled the loan account and had taken the loan from the bank. According to us, the document mark 12/54 could have been exhibited and received in evidence and the contents thereof could have been considered by the trial Court. Even this Court can consider this document if it finds to be a document legally proved. To avoid any legal complication even if this document is ignored, it has

come on record that against the investment of Rs.2,10,000/- accused no.1 had taken a loan of Rs.1,88,000/-. He, being an employee of Bombay Mercantile Cooperative Bank, was knowing deceased Firozbhai and the deceased Firozbhai was also having account in his bank having its branch on Relief Road. When the loan was taken by accused no.1, deceased Firozbhai had accompanied him and deceased was also with accused no.1 on 20.2.1984. Both of them had met him and the account was settled against the fixed deposit. In the cross-examination, no suggestion is made that some cash was paid back to accused no.1 by the bank nor it is suggested to this witness by the counsel appearing for accused no.1 that there was some amount standing as credit even after collecting the interest on the loan amount. This fact situation gets relevance because the loan account can be settled against the fixed deposit if raised against a particular deposit only if the loan amount with accumulated interest is either equal or less than the amount of fixed deposit with accumulated notional interest. This fact ought to have been brought on record during the course of cross-examination. It appears that considering the figures on the document produced by the prosecution vide mark 12/54 no

questions were asked to this witness. Whether it would be conjectures or surmises is a question but it is possible for the prosecution to argue that deceased Firozbhai must have played some role in getting the loan account settled being the loan account with interest had exceeded to the actual credit. Without entering into the merits as to the contents of the document mark 12/54 on the strength of the deposition of P.W.9 employee of Bombay Mercantile Cooperative Bank, it is legally possible to argue that journey of accused no.1 with Ismailbhai along with deceased probably was not motiveless in severe cold days because there is no evidence on record to show that there were very thick relations between accused no.1 and 3. Even for the sake of argument that the deceased had friendship with accused no.1 and 3 both and in the same way, accused no.1 and 3 were also friends, it would not make the allegation as to the motive placed by the prosecution doubtful and in number of cases this Court and the Apex Court have observed that there is no need to prove the motive in the evidence of direct witness. Under the circumstances, as observed by the Apex Court in the cases that in the circumstantial evidence also motive is also not even required to be

pleaded or strictly proved. **(2002) 6 SCC 715 (Mohibur Rehman Vs. State of Assam)**. But when it is accepted settled position that in case of circumstantial evidence when the prosecution has pleaded a particular motive, then such motive is required to be proved. As observed by the Apex Court, the prosecution is not supposed to prove motive by leading cogent or convincing evidence, it can be proved substantially and/or by placing mitigating circumstances so that reasonable positive inference can be drawn as to the existence of motive or possible motive. In the present case, writings given to deceased Firozbhai by accused no.3 to sell or to give the tyres on credit or otherwise to the customers of Savarkundla are produced vide Exhs.21, 21 and 22. The fact stated by employee of accused no.3 that they were purchasing tyres from the deceased, books of accounts of deceased show the name of accused no.3 as debtor being the person mediator or guarantor and financial relation between accused no.1 and deceased if are considered, then it is not possible for the Court to say that there is no evidence as to the motive. Out of three documents Exh.20, 21, and 22 in two documents i.e., in Exh.21 accused no.3 has written that payment of

consideration of the amount of two tyres will be his (accused no.3's) responsibility. In the same way, accused no.3 had requested the deceased to accept 50% amount by post-dated cheques of five tyres that were to be given to the note holder. The holder of the note was to be given five tyres of 1,000 x 20 size. The account of accused no.1 Asrafkhan though was produced before the trial Court in the list Exh.12 vide mark 12/53 but no attempt was made to prove this account through PW 3 Mahammad Usman i.e., brother of the deceased who could have proved this document was examined during the trial. So, involvement of accused no.1 in some financial transactions as emerged from the oral evidence of the brother of the accused (para 1, page 167 of paper book) and the witness examined from the Bombay Mercantile Cooperative Bank Ltd., mention the transaction with the cooperative bank which has been discussed hereinabove. So, it is not necessary to repeat this part of the evidence. The incident of not giving tyres to the person one Mr.Salim by deceased Firozbhai before few days as he has not paid money and was asking for tyres on credit and there was some telephonic conversation on this issue between accused no.3 and the deceased has come on record in the deposition of P.W.20 Fakruddin

employee of the deceased and P.W.5 Kanubhai Madhubhai and no material contradictions have come on record. So, this evidence ought to have been considered while evaluating the existence of motive on account of financial transaction. Learned trial Judge, while appreciating the evidence as to the motive, has ignored very material and crucial aspects that are available on record and that too by evidence legally proved. This set of evidence is oral as well as documentary and, therefore, while accepting the theory of accidental fire, the trial Court has fumbled.

22. Learned trial Judge has not appropriately appreciated above discussed crucial part of evidence when the evidence as to motive was required to be appreciated in true perspective.

23. It is accepted proposition of law that a motive to commit crime may be hidden in the mind of the accused and on this count only in large number of cases the accused persons are successfully carrying the victim with them either on inducement or under the guise of other cordial relationship and then heinous crime qua body or the property or both are

being committed is the experience of the society and, therefore, only wisdom of the Court has carved out the principle that the prosecution should not be fastened with the liability to prove the actual motive of the crime. Here, in the present case, probable motive has been successfully proved by the prosecution. This evidence does not leave any room of doubt that the idea to divert motor car towards Nal Sarovar in respect of proceeding towards Savarkundla for affecting recovery from the debtors and introducing accused No.2 with his licenced gun is the conduct of accused Nos.1 and 3 which substantiate the case as to probable motive. The hunting activity or fishing normally in the civilized society is not the activity of need unless hunter is to earn his personal livelihood from that activity. For rest of the people hunting may be either hobby or activity of either entertainment or activity of mental relaxation. When the group had left Sarkhej for the goal, normally, they would not divert themselves for hunting and gun cannot be used if fishes are taken out of pond or lake. Surrounding circumstances speak that Ashrafkhan accused No.1 and Ismalbhai accused No.3 had decided to get rid of financial burden unaccounted or accounted that they were owing to

deceased Firozbhai and accused No.2 had knowingly or intentionally decided to accompany accused Nos.1 and 3 by joining them with his gun which was ultimately found used in commission of the crime. So, we do not find any merits in the submission made by the learned counsel appearing for the accused persons Ms.Ami Yagnik, Mr.Champaneri and Mr.Saiyed that there is no evidence as to motive to commit such heinous crime as deceased was friend and associate of accused Nos.1 and 3 and there is no evidence as to animosity between them or accused No.2.

24. True it is that the prosecution has not led any evidence to show the cause for which accused No.2 must have joined accused Nos.1 and 3 and that too by providing his licenced gun. In the same way, it is not possible for the Investigating Agency to prove the strength of closeness of the relation between the individual even in the group of friends. It is the experience of the society that there may be circles within circles and closeness or strength of ties amongst the friends may differ from friend to friend and in such a situation, it would be too much for the Court to expect the evidence from the prosecution of this nature because accused No.3 himself in his

written explanation under Section 313 of the Code has accepted that gun of accused No.2 is the cause of fire. His contention is that fire was accidental, but as he was misguided / misled by accused No.2, he and accused No.1 did not unfold true story of the event occurred when they were initially asked about occurrence, firstly by the Hospital authorities and thereafter by Police personnel of Ellisbridge Police Station of Ahmedabad. The statement of accused No.3 or any part thereof falls in the category of confession, then that culpatory part of the statement of accused No.3 would not bind accused No.2 and such piece of evidence is considered to be weak piece of evidence. There is no evidence on record to show that accused No.3 thereafter had retracted from the statement made by him under Section 313 of the Code. According to us,if the statement under Section 313 of the Code is not the statement of clear cut confession of the offence, then the Court can safely consider to use the same against the maker of the statement i.e., accused No.3. In the present case, there is no need to stick to assurance as to the occurance of such statement. Entire written statement / explanation of accused No.3 if read in reference to the answer given by accused No.3 to the

question asked by the Court during his examination under Section 313 of the Code in the present case, it is possible for the Court to use the statement against accused No.3 or while appreciating his say to the Court being maker of the statement in the background of the evidence led by the prosecution against him when it is legally permissible to do so, then on evaluating the strength of the case, very statement can be made use of and such use of statement recorded under Section 313 of the Code of one of the accused cannot be said to be use of statement of accused against co-accused. In the case reported in 2006(1) Criminal Law Journal 46, the Himachal Pradesh High Court has observed that the statement of co-accused can be used at least for lending assurance to the say of the prosecution by and not as aid to supplement the evidence. In the present case, the prosecution has satisfactorily established by examining the Doctor and through PM note as well as muddamal collected from the body of the person deceased and also by examining the FSL expert with muddamal gun seized during the course of investigation found to have been used and injury on the person of the deceased could be caused by the muddamal gun. We will deal with the expert evidence

led by the prosecution in a later part of the judgment. The statement of accused No.3 can be used for lending assurance as to the evidence collected by the prosecution. The story of the prosecution is consistent as to the presence of accused No.2 at the scene of offence. It is true that important witness in this regard has not supported the case of the prosecution and he has been declared hostile i.e. PW 21 Babubhai Baldevbhai. The contradiction brought on record and proved during the trial cannot be read as substantive piece of evidence and use of such evidence is useful to the Court in evaluating the evidence of that particular witness who has been contracted, but at least such evidence prevents the defence side from arguing that no attempt has been ever made by the prosecution to prove one of the important links that could have been established by examining the particular witness. Considering petrol consumption which was there in the petrol tank and when it is neither suggested to the prosecution witness including the Investigating Officer nor pleaded by the accused that the car had went out of order for reasonable good time, topography and distance of the area within which the deceased along with accused persons had travelled from Sarkhej to

the place where he succumbed to the injuries and return journey of the car from the spot of incident to the VS Hospital, such long time would not have consumed i.e., from 10.00 – 10.30 p.m., to about 9.30 a.m., on the next day. So, the car must have stopped somewhere during some hours at night between 20th February and 21st February, but non-support of this witness does not make the case of the prosecution doubtful as to the presence of accused No.2. It is in the evidence that accused No.1 was present who had informed telephonically to the employee of the deceased whereby he had requested to send Vahidbhai to the VS Hospital (para 3 of the deposition of PW 3 Mohammad Usman Exh.19 and para 3 of the deposition of PW 20 Fakhruddin Exh.58). The presence of nitrate in the hand-wash of this accused establishes that at the time of sustaining gun shot injury by deceased Firozbhai accused No.1 Ashrafkhan must be very close to him or he must be responsible for the injury. The question would be why the Investigating Agency would falsely implicate accused No.2 in the crime? There is no animosity between the local police and accused No.2 nor CID Crime. On the contrary, accused No.2 was, as emerging from record, Sarpanch of village and the resident of the City of

Ahmedabad, had no business to even indulge in village politics of the village of accused No.2. The false implication of accused No.2 by any other co-accused is not capable of any help to accused Nos.1 and 3 in carving out their defence. It is proved that muddamal gun was seized from accused No.2 and thereafter it was sent for FSL examination. One burnt cap of used cartridge recovered by the police from the residence and cooking part of PW Karim Bhana on analysis by the FSL expert is found to have marks of firing of the gun seized from the accused. There is some conflict as to the seizure of gun from the accused in the presence of panchas, but when accused No.2 has not disputed that muddamal gun is the gun which was seized during the investigation, accused No.2 be linked with the offence, because it is not the say of accused No.2 in his explanation under Section 313 of the Code that either accused No.1 or accused No.3 under some inducement had taken his gun as they were going for hunting. Of course, accused No.2 has denied that he had accompanied other two accused or his licenced gun is used in the alleged incident, but when used cartridge found from the resident of village Meni i.e. Karim Bhana is having similarity with the marks that were found of test

fire cartridge and when it is satisfactorily established by the evidence of FSL expert that metal cap recovered from the residence of Karim Bhana i.e. Exh.Y is the identical and similar to the test fire cap, then it was safe for the Court to infer that cap Exh.Y must have been fired from very muddamal gun. The opinion Exh.34 in reference to Exh.Y states this:

> “Is a fired base portion of KF 12 cartridge. The identification mark on the cap of Ex.Y was examined and was compared with the firing pin mark on the test fired cartridges, test fired from both barrels of Ex.X.”
>
> This Exh.X is double barrel breach loaded 12 bore gun found in working condition”.

25. The Scientist has observed that “characteristic features of firing pin marks on Exh.Y and that on the test fired cartridge test fired from left barrel on Exh.X were similar, thereby showing that Exh.Y has been fired from the left barrel of Exh.X”. It was not possible for the Investigating Officer to connect or plant fire base portion Exh.Y if the muddamal gun Exh.X had remained with accused

No.2 only and he had never parted with it in the recent past otherwise, it is possible for accused No.2 to at least show to the Court that he has been wrongly linked with the gun shot injury found on the person of the deceased. It is true that the case against accused No.2 is based purely on circumstantial evidence because no independent witness had seen accused No.2 in the company of the deceased. One person who had seen all three accused in the company of the deceased has not supported the case of the prosecution as mentioned earlier. But, that by itself would exonerate accused No.2 from the liability of sharing intention would be a question. The probability of misusing gun of friend to secure the intention that accused Nos.1 and 3 were carrying in their minds, whether it is possible to infer is also again question. Learned trial Judge has not differentiated the case of accused No.2 and other two accused i.e., accused Nos.1 and 3. The acquittal is the basis of finding that the fire was accidental but when it is argued by the State that it was not accidental fire, then role of each accused with all other probabilities and infirmities if left by the Investigating Agency obviously need consideration and, therefore, only backbone of the argument of

Mr.Champaneri who represents accused No.2 is that there is no adequate evidence against accused No.2 and mere recovery of muddamal gun (Exh.X) is not sufficient to link the accused with the crime and it was not duty of the accused to explain that how that gun had reached to the accused, so that they can use the same for fulfilling their intention.

26. Mr.E.E.Saiyed and Ms.Ami Yagnik have mainly hamarred on the point that the order of acquittal should not be reversed merely other view is possible on the same set of facts and in support of this submission, they have placed reliance on the decision in the case of **Uttar Pradesh Vs. Shri Kishan, reported in (2005) 10 SCC 399** where the Apex Court in para 9 has observed that when the reasons given by the High Court for acquitting the respondents appear to be reasonable and are based on evidence, it is well settled that even if on the basis of some evidence two views are possible, the Appellate Court will not be justified in reversing the order of acquittal if the same is based on the evidence on record and the view taken is possible reasonable view of the evidence. The other decision repeated the

same principle relied upon by Ms.Yagnik and Mr.Saiyed reported in **(2006)1 SCC 401**. This cited decision is under the Prevention of Corruption of Act where the trial Court had acquitted the accused, but the High Court reversed the order of acquittal and held the accused guilty. The order of conviction of High Court was challenged before the Supreme Court. The Apex Court, while dealing with the scheme of Sections 378 and 386 of the Code, has observed that the High Court, without holding that the view taken by the trial Court was perverse or erroneous, erred in reappreciating the very same evidence and coming to contrary conclusion. It is argued that this Court should not reappreciate the evidence unless it is possible to observe that the finding recorded by the learned trial Judge is erroneous and no possible view that could have been taken and it is perverse. When the Investigating Agency itself had reached to the conclusion once that fire was accidental and the accused persons were to be charged for the offence punishable under Section 304-A of IPC, then this Court at least should not interfere with the finding of acquittal. The element of negligence was noticed by the Investigating Officer and, therefore they were to be charged for criminal negligence punishable

under Section 304-A of Indian Penal Code. The accused could not have been chargesheeted for the offence punishable under Section 302 read with Section 34 and / or 114 of Indian Penal Code. It is the wife of deceased who had influenced the highest officer sitting as Head of CID Crime of State of Gujarat by making an application and on suspicion, the accused were chargesheeted. There was no scope to implicate any of the accused in such serious offence punishable under Section 302 of IPC.

27. Very little investigation had taken place after the application received by Mr.Bhaya, Head of the CID Crime and those papers are part of final report submitted to the Court. Most of the papers are part of the investigation carried out earlier except the complaint i.e., written application sent by the wife of the deceased. Rest of the evidence is collected after the application made by the wife of the deceased PW 2 Banubibi (Exh.16). We are afraid that learned Judicial Magistrate, First Class probably might have thought to commit the accused to the Court of Sessions because there is nothing on record to show which can be said to be in the nature of evidence collected by the police that fire might

have taken place accidentally. On the contrary, there was enough investigation on this line and on careful reading of evidence of Ballistic Expert PW 7 Exh.31 Mr.Jaiprakash Barot and his opinion Exh.32 clarifies that there was no scope for accidental fire. On 20.4.1984 the expert had already opined that (1) If gun mark X of Case No.FSL/EE/84/BL/34 is loaded and the safety pin of the gun is released, it will not fire unless trigger is pressed and (2) Laboratory test shows that gun does not get fire by jerk or fall.

28. On the contrary piecemeal glaring that was sent by the Investigating Agency and delayed attempt to compare wheel marks with the wheel marks taken from the spot of the incident creates an impression that the Investigating Agency prior to the intervention of the highest officer on the complaint application filed by Banubibi probably was trying to give maximum punishment that can be given to the accused for the reason that the Investigating Officer had decided initially to file the chargesheet for the offence under Section 304-A appears to be firm and prejudicial decision, if it was really criminal negligence, then only one who is found to have

mishandled the gun and have been chargesheeted and none of the three. The hand-over of gun by accused No.2 to unauthorized person if was emerging from the evidence collected by the Investigating Agency, then accused No.2 could have been charged for the separate offence punishable under the provisions of Arms Act and not for negligent handling of muddamal gun as no hand-wash was taken of accused No.2. The case of the prosecution is that hand-wash of accused No.1 shows the presence of nitrate. This poses him to be a person who could have used the gun. According to the prosecution, accused No.3 was driving the vehicle, so, there was no scope for him to handle the gun, how he could have been linked with the offence punishable under Section 304-A. All the accused, on erroneous chargesheet, were likely to get maximum punishment and naughty officer even could have filed “C” summary report by using different phraseology in the last column of police report under Section 173 of the Code. Learned trial Judge has not at all paid any heed or applied the mind to the totality of the evidence collected even prior to the application made by Banubibi to Mr.Bhaya which has been treated as FIR. The poor widow must have felt constrained as nothing concrete was coming out after prolonging the

investigation and accused Nos.1 and 2 were enjoying the liberty as if they were informants firstly to the Ellisbridge Police Officials and then to Umrala Police. When Umrala Police clearly pointed out that no offence as alleged has been committed within the jurisdiction of Umrala Police Station, the police ought to have arrested both the accused i.e., accused Nos.1 and 3 and thereafter, accused No.2. In absence of any convincing evidence or plausible explanation from the accused side, there was no scope for the learned trial Judge to join innovative idea that had crept up in the mind of the police that fire may be accidental and not intentionally. One accused admits the presence i.e., accused No.3 all throughout. The presence of accused No.1 is satisfactorily established from the evidence of the witnesses examined by the prosecution and the presence of accused No.1 at the VS Hospital in the early morning on 21.2.1984 is the evidence of cogent nature, and, therefore actually the learned trial Judge has believed the case of the prosecution. Substantive portion which has not been believed by the learned trial Judge is based on patent error and improper appreciation of evidence. The findings are recorded in ignorance of convincing opinion evidence available

on record vis-a-vis the conduct of the accused.

29. The conduct of the accused persons is found relevant in all cases based on circumstantial evidence. The conduct prior to the incident, the conduct when the actual incident occurred and the evidence if any led by the prosecution as to the conduct subsequent to the incident are relevant and while evaluating the conduct of the accused in the case based on circumstantial evidence, normally the Courts are dividing the conduct of the accused in the above categories. Here, in the present case, as observed earlier, the conduct of accused No.3 showing reluctance in going to Savarkundla for recovery of the amount and his modus showing willingness initially and avoiding the deceased in the work of recovery subsequently at last hours when they were to leave Savarkundla in the car of accused No.3 himself cannot be ignorant. In the same way, sending the car to a mechanic, so that it can run smoothly and does not create trouble in the midst is one more fact situation which has incidentally come on record, otherwise the car was not giving that big trouble to the user. Even then, the same was sent to Garagewala and was procured on the day on which accused No.3 was

supposed to leave with the deceased on long drive. This has been ignored by the learned trial Judge. In the same way, falsity of the information given to the Ellisbridge Police Station and also to the Hospital authority at VS Hospital by the accused persons ought to have been seen significantly. The admissibility of the statement made to the Doctor would not come under scanner, but the application given to the Ellisbridge Police and the facts stated therein i.e., complaint given by accused No.3 on commission of the offence of loot by stranger etc., and stating that in that scuffle unknown or unidentified persons had caused gun shot injury to the deceased; even if it is considered as inadmissible and kept being the statement of the accused to the police, then also the statement of accused No.3 before the Court under Section 313 of the Code positively would help the prosecution. As such none of these two were informed the death of the deceased and why they would kill their friend deceased. This argument was advanced before the learned trial Court and it is advanced before this Court also by the learned counsel Ms.Ami Yagnik and Mr.Saiyed, but the Court would like to state the gist of the statement made by accused No.3 under Section 313 of the Code in response to the

questions asked by the Court in reference to incriminating evidence against accused persons. While answering the question Nos.231 to 254 accused No.3 has practically accepted the oral say of Salim – his employee whereby he has also accepted that he had left in his car. He has also admitted the exercise undertaken by the FSL expert as to taking of hand-wash of this accused and co-accused accused No.1. Of course PW Kalubhai, resident of village Meni has not supported the case of prosecution, but accused No.3 in response to the question No.275 has admitted the presence of PW Kalubhai Meniwala and fire of the gun that had taken place. While answering the question No.258, he has stated that he is tendering his written reply and that written reply is available on record vide Exh.116. It is true that the statement should be read as a whole. If the Court finds that any culpatory part of the statement of the accused is either false or not acceptable otherwise on the strength of the evidence led by the prosecution, then culpatory part of the statement of the accused and / or implied admission on crucial facts can be led and considered by the Court while evaluating the strength of the case of prosecution is the law. (AIR 2002 SC 3582 – Mohan Singh Vs. Prem Singh). For convenience,

we would like to state gist of relevant paras of lengthy written reply running about in six pages. He has stated that deceased Firozbhai was friend and he was helping him in his business and he was also going with him in recovering debts and was also helping him in that work. On 20.2.1984 deceased Firozbhai was to go to Savarkundla for recovery of the amount from the traders and deceased had requested him to accompany and as per his request, they have decided to go in his car bearing No.GJ E 5593 and they have left in that fiat car with Firozbhai and accused no.1 Ashrafkhan. The accused no.2 was a friend of accused no.1 and deceased Firozbhai and he was taken with them on the request of deceased Firozbhai and Ashrafkhan and, therefore, the car was initially taken to village Gangad. Deceased Firozbhai, accused no.1 and accused no.2 Mahammadkhan were fond of hunting. Mahammadkhan has taken his rifle with cartridge and accused no.2 had joined from village Gangad. They had stayed overnight since 11.30 p.m., on petrol pump i.e., petrol pump of Bansidhar Automobiles as that petrol-pumpwala was known to accused no.2. He has accepted that he was driving the motor car. The accused no.1 Ashrafkhan was sitting on the rear right seat and accused no.2 was sitting to

his left side of the driver seat i.e., beside driver. Near Nal Sarovar, they saw one rabbit in the light of the motor car and at that time Mahammadkhan had loaded his gun but before the target could hit, that rabbit had escaped. The cartridge had remained loaded. When they were proceeding further, one person known to accused no.2 i.e., Kalu Mer was proceeding towards Nal Sarovar and seeing him, they had stopped the car and he was asked to sit on the front seat with Mahammadkhan as there was no space to keep the rifle in the front seat. As it was inconvenient, it was given to Firozbhai and it was kept in vertical position between the deceased and accused no.1 Ashrafkhan. When the car was passing through rough road, the car got strong jerk and he heard fire. At that time, he saw injured Firozbhai bleeding. On asking, Ashrafkhan informed that the gun has fired. Thereafter, the gun was taken by Mahammadkhan. The case of the cartridge was taken out of the gun and it was thrown on the spot.

30. In para 6 it is stated that because of injury to deceased Firozbhai, they were shocked and they had decided to go to Ahmedabad immediately. They took turn and started for Ahmedabad. Kalu Mer was

dropped near the sign board of village Meni. Accused nos.1 and 2 had threatened and had told him that he should not disclose the incident that has happened and the police should be informed that when they were proceeding towards Umrala unknown persons after stopping the car has fired and that Firozbhai had sustained injuries. By that time, the car had reached to the sign board of Gangad and Mahammadkhan with his gun dropped from the car. While leaving, he had again threatened and asked him not to disclose the true facts. It is the say that he was under the threat and fear as accused no.1 and 2 are head-strong persons and he was fearing for his life. Thereafter, Firozbhai was taken to the V.S.Hospital but the doctor had declared him dead. Thereafter, he has informed at his office and had asked his employee Aiyub and Salim to come down to the V.S.hospital. It is the case of this accused that during the incident he was driving the car and upto Ahmedabad till the injured brought to the V.S.hospital and he is not exactly aware that how the rifle that was kept in the rear portion of the car got fired because he was concentrating on the car driving. His one hand was on steering and the other hand was on gear. As the road was bad, he was compelled to change the gear

frequently. It is stated that initially he was arrested for the offence punishable under Section 304-A and was enlarged on bail. Thereafter, he was arrested for very serious offence.

31. We have carefully seen the record called for from the lower Court and it appears that the accused persons were granted bail being the offence punishable under Section 304-A is bailable. Thereafter, as such only the paper arrest was made of the accused persons. One accused was granted anticipatory bail and, thereafter, all the three were enlarged on bail on the order of the competent Court. These are all procedural aspects and we are not concerned about supplementary proceedings that had taken place after registration of the offence initially by the Ellisbridge police. But the statement of the accused no.3 can be used for assessing the strength of the case of the prosecution. It cannot be used against any other two accused persons because it is not binding to them but the ultimate effect of using of the statement in evaluating the strength of the case of the prosecution hits the defence taken up by other two accused persons then the prosecution can make the use

of this situation. It is true that no body should be linked with the crime in absence of cogent and convincing evidence or weakness of the defence side. The accused Nos.1 and 3 though claiming to be friends and even before this Court, it is argued that accused Nos.1 and 3 were friends, then they had no reason to kill the deceased Firozbhai for petty amount of some thousand rupees. The crucial question before the Court is that whether theory of accidental fire placed by accused No.3 should be accepted or when accused No.3 himself has not specifically stated that it was accidental fire and not intentional one by accused No.1, then what would be its effect. Merely because accused No.3 has stated that he was all the way driving the car, whether he can advance plea of innocence or he should be held guilty of the offence punishable under Section 302 read with Section 34 and / or 114 of IPC is the question which was required to be addressed by the trial Court and according to us, no concentration has been made by the learned trial Judge while evaluating the evidence.

32. The opinion expressed by the doctor who has performed the post-mortem and of the doctor who has supervised the autopsy has brought one fact situation

on record that the deceased can have sustained fatal injury from the distance of about 9 to 12 inches or at the distance of about 2 ft., or so. PW 1 Dr.Dhanraj Kothari in his deposition has stated that fire must have been made within the distance of one feet. According to Dr.Kothari the actual postmortem was performed by Dr.Ms.Desai. The certificate Exh.50 tendered in evidence signed by Dr.Ms.Desai states that distance of fire is within one feet. The evidence of Dr.Ms.Desai is at Exh.23. She has been cross examined at length. During the course of cross examination made on behalf of accused Nos.1 and 2, she has replied to the suggestion made that in the original opinion, she had shown this distance of about 2 feet, but after consulting Dr.Kothari, she had changed it to one feet. It is mentioned in the postmortem note in column No.8 that there were black dots on the jacket put on by the deceased. It is stated by this witness in the cross-examination made on behalf of accused no.3 that, “I had seen burn marks at the place where there were holes on the jacket. They show that fire arm was used within one feet distance and according to her one feet is the maximum distance.” It is true that the direction of wound was upward. The details of length of double

barrel muddamal gun and other measurements are there in the evidence and if the gun is kept vertical then in the event of accidental fire, roof top of the motor car or any part of the car on the upper side would get some marks on account of hit of pallets which could have been seen on the inner roof top of the car. For the sake of argument, it is presumed that the gun could be lying horizontally, then the deceased would not have sustained injury on the chest. If the barrel of the gun was practically touching or very close to the deceased lying in the upward position neither vertical nor horizontal then entry wound would not have been of such nature that was seen by the doctor and mentioned in the post-mortem note.

33. Some detailed discussion have been made by us as to the theory of accidental fire in earlier paragraph but then in that eventuality the conduct of all three accused would be materially different. The accused nos.1 and 3 would not have left accused no.2 behind with his muddamal weapon. Learned trial Judge appears to have concentrated mainly on the deposition of the hostile witnesses including Babubhai Baldevbhai – employee of Bansidhar Automobiles

situated at Bagodara – Dholka cross-roads and P.W.23 Kalubhai Dhulabhai, P.W.15 Karim Bhana and P.W.16 Kalu Meru along with panch witnesses who have not supported the case of the prosecution including the panch of seizure of muddamal gun, cap of cartridge Exh.Y and controlled clay collected from the sim of village Meni i.e., from the spot as per the prosecution pointed out by accused no.3. If the witness is wholly unreliable then his evidence cannot be made use of as corroborative piece of evidence. The prosecution cannot legally attempt to read the evidence of two hostile witnesses and to infer such things in favour of the prosecution. But there is no bar in accepting the evidence of the police personnel. The circumstances emerging in the evidence are sufficient to show that the police could not reach to the actual spot of incident because of some false information given to the Ellisbridge Police Station and in turn Umrala Police Station. All reasonable attempts were made to trace the offence treating accused no.3 as informant and when it was found that real story which has remained unfolded by the persons who were in actual company of the person deceased. It is clear from the evidence of police witnesses which is found reliable that the

police was able to reach to the spot of incident on the clue received from the accused. It is true that any statement made by accused no.3 cannot go in evidence and cannot be read in evidence as a part of evidence in support of the prosecution being inadmissible. But in the present case, the prosecution has attempted to prove that clue received during interrogation has legs to stand despite of the hostility of P.W.Karim Bhana, P.W.Kalu Meru and panchas in whose presence the controlled clay was collected by Mr.Jhala. Despatch note Exh.79 along with other evidence satisfactorily proves that the car was sent for detailed examination to the FSL authority on 22.4.1984 by the Ellisbridge Police Station. So, the sample clay / mud etc., were with the FSL authority since 22nd April and thereafter the controlled clay was sent for analysis so that it can be compared with clay / mud that had remained on car during the event hours of 21st February or immediately after the mid-night of 20th February. There is positive evidence as to recovery of clay at Exh.78 and practically there is no cross examination on the point of genuineness of recovery. The Police Officer has been examined on sealing aspect. Despatch note Exh.79 clearly reveals that sample clay was in sealed

condition and it has reached intact with seal to FSL. The cross-examination of Inspector Mr.Jhala (page 283 of paper book) on the contrary gives impression that defence side does not dispute recovery of clay from the spot of incident or its sealing by Mr.Jhala. We fail to understand that why the evidence has not been given any importance by the learned trial Judge though the same is relevant and important piece of evidence. We have discussed earlier that similarity of clay found on the car and the controlled clay collected and sealed by the police satisfactorily establishes the presence of car owned by accused No.3 on the spot of incident at least once and that too prior to 22nd February because on that day, the car was sent to FSL for examination. The hostility of the panch witness on the recovery of controlled and sample clay is not to destroy the evidence led by Mr.Jhala and the positive opinion expressed by the FSL. There is no reason for us to ignore the opinion expressed on the point of similarity of clay recovered from two different places i.e., from the spot of incident came to the notice of the police during interrogation and the motor car. This evidence links the car owned by accused No.3 and the place of incident in satisfactorily manner. Some

comments have been made as to the conduct of the accused. But, the learned trial Judge ought to have concentrated on the point that when the clay found from the motor car establishes the link between the spot of incident and the car itself, then how and why wheel marks would differ. It is true that at the time of taking photographs as they were taken out after the lapse of long period, some other vehicles might have run over including the vehicle used by the agriculturists in the surrounding area. This possibility to some extent tilts balance in favour of the accused and the Court should not conclude against the accused that accused must have managed for change of tyres as they were in the business of that line and it was easily possible for them to do so and they can get favourable conflict report as to the wheel marks. When the clay tallies, the wheels cannot differ. Therefore, dissimilarity in the tyre marks focused by the learned trial Judge while dealing with the circumstances “F” and “G” should not be given more weightage since more scientific and convincing evidence in the nature of report of similarity of clay is available on record along with the oral evidence of Mr.Jhala.

34. In this set of evidence available, the statement of accused No.3 as to use of his car and the presence of his car at the spot of incident becomes relevant. Learned trial Judge ought not to have ignored this crucial aspect and this has resulted into gross error in appreciation of evidence because accused No.3 has accepted use of his car and its journey towards Nal Sarovar.

35. While dealing with circumstance “E”, learned trial Judge has ignored many material aspects and availability of cogent evidence and according to us, finding recorded by the learned trial Judge in reference to circumstance “E” is neither convincing nor acceptable in light of availability of the evidence. It is true that Exh.Y is collected at later stage and panchas have not supported the case of the prosecution, but again the evidence of Mr.Jhala is found relevant whereby he has stated that Exh.Y i.e., portion of used cartridge was recovered at the instance of PW Karim Bhana and in the presence of panchas, but it appears that PW Karim Bhana and two panchas have shown total hostility to the prosecution, but the evidence of Mr.Jhala is sufficient to hold that Exh.Y metal cap of used

cartridge was sealed at a given point of time and date in the presence of panchas. The genuineness of signature of panchas has not been disputed nor sealing procedure. This article Exh.Y was recovered as per the prosecution on 12.3.1984. An attempt to destroy the evidence was made, but ultimately the police was able to reach to the evidence Exh.Y (Article No.36) from the residence of PW Karim Bhana. It was recovered from the ashes of village furnace used for cooking purpose, popularly known as “Chula”. This Exh.Y (Article No.36) was not tendered by PW Karim Bhana, but it was recovered during search. The police could have joined this PW Karim Bhana as accused for the offence punishable under Section 201 of IPC or he could have been separately chargesheeted for that purpose, but for the reasons best known to the Investigating Agency, he was made witness in the initial report that was prepared by the Investigating Agency for the offence punishable under Sections 336, 304-A and 201 of IPC surprisingly against all three accused. As discussed earlier, when the charge of criminal negligence is placed, then mens rea would not have any room to play for the offence punishable under Section 304-A of IPC. It is not necessary to reproduce the scheme of Section 201 of IPC, but

culpability punishment under this section is divided in three major parts and, therefore none of the accused as per the report prepared initially by the police could have been linked with the offence made punishable under the third category i.e., less grave category than other two mentioned in the section. Plain reading of Section 336 which was mentioned by the police in earlier report which was prepared for approval also provides for punishment for rash and negligence act which is capable to endanger the human life or personal safety of others. So, hypothesis that was placed by the learned counsel during the course of cross-examination mainly to the FSL expert PW 7 – Jayprakash Barot whereby this witness was suggested that muddamal gun if many things are presupposed then could have fired cartridge lying inside which was loaded initially to hit the target i.e., running rabbit. Meaning thereby, story told by the accused persons or any one of them was about to be accepted at the time of submitting the final report under Section 173, but on account of some more investigation made, close examination of the report submitted by the FSL and on intervention of the highest officer sitting as Inspector General, CID Crime, the police chargesheeted the accused. So, the

evidence was required to be scanned very closely and according to us, the approach of the learned trial Court is found casual. The ownership of gun has been established beyond doubt than seizure of Exh-Y i.e. Article No.36 could have been viewed from the proper angle. The date is relevant because muddamal gun produced by accused No.2 was already seized and sealed on 10.3.1984. The accused No.2 has confirmed that on 10.3.1984 at about 6.00 muddamal gun and licence have been seized from his residence. When this fact is admitted, then the Court has no reason to disbelieve the panchnama drawn by the police about recovery of weapon i.e. Exh.57. The document Exh.57 describes the weapon in detail, its length etc., wherein it is mentioned that gun was put in cloth bag and the seal of the police was affixed. The panchnama was drawn between 18.00 – 18.30 hours. It is not the say of accused No.2 that it was seized in time prior to 10th nor it was suggested to any police witness including Mr.Jhala – seizing officer of muddamal weapon. When muddamal weapon – gun was seized and sealed at the time even confirmed by accused No.2 in his statement recorded under Section 313 of the Code the crucial question would be that how the marks identical that were found on the

cartridges used for test fire would be similar with the marks that were noticed by the FSL expert on Exh.Y – Article No.36 because the place of seizure differs, the date and time of seizure of this article are different. It would be too much to think against the prosecution that after seizure of muddamal gun fallen fire must have been made by the police with a view to create the evidence against the accused and to implicate accused no.2 in the offence wrongly and cap was then has been shown as the article recovered from the house of P.W.Karim Bhana. Even after doing all this exercise with all vehement, whether the investigating officer would think to file the charge sheet / report for the above mentioned sections or would implicate the accused in a more serious offence would be a question. The Court is not interested in drawing any surmises but the fact remains that why very evidence collected after 8th March and prior to 14th March. The Investigating Agency had no role to prima facie finding that criminal wrong occurred qua the deceased was not the result of any negligence but it was wrong done with an intention. It was possible to infer that mens rea is present. The little investigation that was carried out by Mr.Jadeja is found to be very formal. The evidence collected by

Mr.Jadeja could have been collected from P.W.2 wife of deceased and the brother of deceased. There were ample evidence with the Investigating Agency that the deceased was in company of three accused persons. Initially, he was in the company of accused nos.1 and 3 and then accused no.2 had joined the company. So, the Court is not inclined to accept the argument that the police ultimately decided to charge sheet all three accused for the serious offence punishable under Section 302 of IPC at the instance of Inspector General, CID Crime Mr.Bhaya and under the influence of the application given by the widow of the deceased.

36. The opinion evidence of Mr.Barot if read, material change is found. We have carefully studied his deposition vis-a-vis the proceedings of the sessions trial. Mr.Barot had stepped into the witness box on 22.11.1985. As per the proceedings drawn, he was only witness examined by the Court. The cross-examination of this witness has supported that on that very day one or two questions were asked to this witness and the Court had adjourned recording of the evidence of this witness after recess, but instead of commencing recording of evidence of this

witness (Exh.31), the Court recorded conclusion of recording of evidence on that day and the matter was adjourned. The proceedings reads that recording of evidence was adjourned at the request of defence counsel. Thereafter, the case was posted for recording of evidence of this witness on 2.12.1985 i.e., after about more than 10 days. Because of sick note filed by the advocate appearing for accused Nos.1 and 2 the case was again adjourned to 10.12.1985. On that day, the advocate of accused Nos.1 and 2 did not cross-examine as there is no examination on behalf of accused Nos.1 and 2. The advocate appearing for accused No.3 made cross-examination of this witness and has answered the questions that were framed putting more than one hypothesis and presupposes conditions. Such abnormal questions appears to have been permitted, but the fact remains that Mr.Barot has opined that with all presuppositions and hypothesis anything if strikes or hit the trigger then gun could have fired accidentally. For the sake of convenience and brevity, we would like to reproduce relevant part of answer given by this witness on 10.12.1985 in response to the questions asked on behalf of accused No.3 in vernacular language i.e in Gujarati.

“Caalu> flya3 karma> Aa>cko lagva4I mud<a malnI b>duk p0Day Ane 3\lgr]pr ko[vStu> AkSmat A4Da[=y to Ane b>duk fu3I =y. Aa b>dukma> kartus wrelo hoy Ane sef3I c! avelI rhI g[hoy Ane]pr khyu> tem calu> gaDIma> Aa>cko lagva4I b>duk A4Day Ane 3\lgr]pr ko[vStu> A4Da[=y to Aa s>jogoma> AkSmat fu3I jvana s>jogo 4ay. Aa kesma> mara m>tVyo jota> be fu34I Ao0a Ae3le car ke 0 [>c je3la A>tr4I p` [= s>wivt 0e. Caalu> flya3 karma> mrnar Ane bI+ VyiKt be#el hoy Ane mrnarne je [= 4[0e. te [=no p/kar [=nI dIxa nIce4I]pr =y 0e. te4I mrnar pase pDelI b>duk [=no p/kar jota> AkSmat fu3I jvanI xKyta v2are 0e. mo3r na drva= pase4I Ane A>drnI baju4I daruno pavDr m5el 0e. Maa3e b>duk karnI A>dr fu3elI hovI jo[Ae tem khI xkay.”

37. This answer does not destroy ultimate opinion given by this witness and other scientific tests and reports available on record. While drawing

conclusion on the circumstance “E”, learned trial Judge has ignored the totality of the evidence. Learned trial Judge ought to have considered the opinion given straightaway on examination of the articles and answers given to hypothetical compound questions. Such questions could have been disallowed by the Court. The advocate could have been asked to dissect each hypothesis and presupposition. The examination-in-chief of PW 7 leaves no room that there was no scope so far as gun is concerned to get fire accidentally either on jerk or on account of rough road even if safety cap i.e., safety lock is not applied. The pointed question was raised by the Investigating Agency and the opinion has been positively expressed by the expert even after throwing gun from some height and has opined by this witness that after detailed examination and experiment they had reached to conclusion that gun could not have been fired unless trigger is pressed. They have made all experiments and these experiments also described in para 5 of his deposition. So, no weightage could have been given by the trial Court to the answers given by this witness in the cross-examination based on hypothetical questions. In the same way, opinion expressed qua Exh.Y and the opinion

of tracing out nitrate on the hand-wash of accused No.1 could not have been ignored because it is not the say of accused No.1 that he was very close to the gun so that nitrate could touch his hands and could be traced in the hand-wash. The Court has reason to believe that hand-wash means wash of hands upto wrist joint or some upper part must have been taken. The distance of fire assessed by the Doctor as well as Mr.Barot is indicative of fire from close range and upward entry of bullets simultaneously indicates the body posture of the person deceased. The Court has totally ignored the percentage of alcohol found in the blood of deceased Firozbhai. No blood samples were collected of accused Nos.1 and 3 because they had given altogether different story to Ellisbridge Police Station as alleged by the prosecution and so, it was not possible for Ellisbridge police to ask VS Hospital's Doctor to draw sample of blood of accused Nos.1 and 3 or both. The blood of the deceased was drawn from different angle, so that same can be compared with the group of blood found on the motor car and other articles. But, ultimately, it came to use to the Investigating Agency and the FSL laboratory was able to analysis the same and opined that percentage of alcohol found in the blood is

24.07 mg % w/v (Exh.102). Ethyl alcohol of this much percentage was detected from the blood analyzed by the FSL laboratory which was 5 ml. This opinion was received by the police after 27.4.1984 because the date of report is 27th. No questions surprisingly were asked by the Public Prosecutor to the Doctors who were examined to prove the postmortem report etc., that what could be the condition of the person whose blood contains 24.07 mg % ethyl alcohol. After receipt of this report, the opinion is prepared at any point of time. During the investigation, the police has recovered no bottle containing alcoholic drink. It is not the say of accused No.3 or it is not suggested to any witness including the employee of accused No.3 that when deceased Firozbhai left with accused Nos.1 and 3 for Savarkundla, he was full drunk. It appears that this situation emerging from the evidence has been ignored while accepting hazy opinion based on hypothetical questions that were placed to PW Mr.Barot were considered by the learned trial Judge in accepting probability of the accidental fire. As such, plea of accidental fire has been taken by accused No.3 while tendering written explanation and answering question No.275 when was asked to accused No.3 referring the evidence

of PW 31 Police Inspector Mr.Jhala. While answering this question No.275 accused No.3 has admitted even the presence of PW Kalu, resident of village Meni. So, it is not possible for this Court to accept the statement made that PW Kalu (ultimately who turned hostile) was planted as only witness to carve out gross case against all three accused. The closeness of relation between accused Nos.1 and 3 has been brought on record by the prosecution through the evidence of PW 24 Salim and PW 25 Aiyub and the crucial question asked in reference to the evidence given by these two witnesses wherein closeness of accused Nos.1 and 3 has emerged gets support from the answer given by accused No.3 while responding certain questions i.e., question Nos.247 to 263. One crucial fact has also been admitted by accused No.3 that deceased Firozbhai was insisting to go to Savarkundla for recovery of debts and accused No.3 was reluctant and was refusing the proposal. The answers given by accused No.1 in reference to this set of questions i.e., question Nos.247 to 263 are found inconsistent. Against majority questions, accused No.1 has stated that he does not know. However, he has denied that deceased Firozbhai was insisting to go to Savarkundla and accused No.3 was denying. He has answered

question No.260 as “it is false”. In the same way, he has answered question Nos.261 and 262. He has stated that the evidence of PW 25 Aiyub is false whereby he has stated that thereafter after some resistance the deceased had left for Savarkundla in the motor car of accused No.3 with accused No.1 i.e., answering accused. The answer given to question No.259 is that he does not know whether accused No.3 had managed for the sale transaction of motor truck purchased by him i.e., answering accused No.1. The Court is conscious that mistake committed by the accused in answering the questions placed by the Court should not be given much weightage and even certain admissions cannot be made use of in absence of other evidence of convincing nature available on record. In the present case, as observed above, some positive evidence about inter-se relation between accused Nos.1 and 3 and the deceased has been led by the prosecution and material part of this evidence has been admitted by one of the accused i.e., accused No.3 while responding to the questions placed. Therefore, the trial Court ought to have appreciated the case placed by the prosecution while dealing with the relevant chain of circumstances placed by the prosecution including circumstances “E”, “F” and “G”.

There was no reason for the Court to infer that there is no convincing evidence as to the presence of accused No.1 at the VS Hospital as if he had reached with the body of deceased Firozbhai because his presence, as observed, is emerging from the evidence of one witness with whom he had talk telephonically and was present when hand-wash was taken at the instance of Ellisbridge Police Station in the VS Hospital itself. When there is sufficient evidence to show that he was last seen in the company of the deceased with accused No.3, then stand taken by accused No.3 while giving explanation to the Court being relevant can be considered by the Court not against accused No.1 individually, but as to the strength in the case of the prosecution placed before the Court. The resultant effect then if is going against accused No.1, then the prosecution obviously can make use of entirety emerging from the evidence. It is settled law that falsity of the evidence or unconvincing explanation to the evidence led by the prosecution cannot be used against the accused, but the prosecution can use falsity of the plea or stand taken by the accused as circumstance against him and to expose the accused that he has failed in explaining incriminating part of the evidence led by

the prosecution. According to us, the statements of accused persons mainly of accused Nos.1 and 3 have not been read or considered by the trial Court in this background of settled legal position.

38. The FIR i.e., complaint given to Ellisbridge Police Station and the papers of investigation carried out on the strength of that complaint which was in turn sent to Umrala Police Station are not the part of the police report submitted in the present case. The FIR given by accused No.3 to Ellisbridge Police Station considering it as inadmissible has not been produced. But, the fact remains that the accused persons and mainly accused Nos.1 and 2 were not even treated as accused till 10.3.1984. For a long period of more than 15 days, they were being treated as either witnesses or informants. So, this situation has cropped up only because Ellisbridge Police was not even told that the deceased had sustained injuries accidentally. The explanation given by accused No.3 in this regard is found totally unacceptable. It appears that accused Nos.1 and 3 were also close friends and they had business transactions in past and accused No.2 was a man of repute and Sarpanch of village, the authority had

granted him licence to hold the weapon and at the time of giving details to Ellisbridge Police accused No.2 was not present because he was dropped when accused Nos.1 and 3 were removing the injured to the VS Hospital in the midway. The say of accused No.3 in his further statement has brought one circumstance on record which clearly helps the prosecution that under one or the other pretext Ellisbridge Police was not given correct information as to how the incident has occurred. The theory of accidental fire appears to be an afterthought that must have been taken shape after sometime of initiation of investigation and nonavailability of evidence as to occurance of any event within the jurisdiction of Umrala Police Station. The evidence of Police Inspector Mr.Pandya and other police witnesses is found relevant for this purpose.

39. The evidence of PW 10 Dr.Bharat Pragji Solanki is found relevant. On 21.2.1984 he was on duty as Chief Medical Officer and his duty hours were between 7.00 a.m., and 2.00 p.m. According to this witness on 21.2.1984 at about 10.30 a.m. Firozbhai Abdul Latif Havawala was brought in the Casualty Ward i.e., deceased. He was accompanied by two persons.

He has not cared to know the names of the persons bringing injured. He had examined the patient Firozbhai and he was found dead. This patient was brought in Fiat or any other such car. Normally, they are writing history if given, but in the present case, no history was given and this witness had not even cared to ask. He has tried to say that the persons who had brought Firozbhai was like accused No.1, but he cannot say exactly and cannot identify those persons. It has been stated by this witness that in the VS Hospital police personnel are kept and they are performing the duty. The police voluntarily come to the Ward and they are performing their duty and completed the procedure required under the law. In medicolegal case, they are informing i.e. Hospital Authorities informing the police that the hospital duty police should inform the concerned Police Station. This witness has stated that he is not aware that who was on police duty in the hospital on that day and time. In the cross-examination, this witness has accepted that he had never given any Vardhi / information to Police Head Constable on duty. He also does not recollect whether his statement was recorded by the police on 7.1.1985. He also stated that he does not recollect to have stated

to police that “today Vardhi dated 21.2.1984 that has been shown to me was given by me”. Meaning thereby, this witness does not confirm that Police Head Constable Adambhai had recorded the information at his instance. Surprisingly, this witness has not been treated as hostile by the Public Prosecutor nor recalled by the Public Prosecutor or by the Court with the relevant papers of VS Hospital. The witness in examination-in-chief has not even stated that the person brought – Firozbhai was injured and injury was fire arm injury on the chest. It appears that this witness has attempted to help the accused persons or he was not at all serious in performing his duty otherwise he could have brought the case papers with him on the day of deposition and said to the Court that he has brought the case papers. Initially, formalities must have been performed by this witness. Only thereafter body of the person deceased i.e. Firozbhai could have been sent from the Casualty Ward to mortuary. The Investigating Agency has even not cared to obtain the copy of the papers from the VS Hospital. Learned Presiding Judge ought to have recalled this witness with case papers if the Public Prosecutor had missed to put certain pointed questions. The Court even could have confronted this

witness from his previous statement if the Public Prosecutor has missed to ask certain questions. But, we would not like to make any comments on the efficiency or integrity of this witness or his sincerity towards the duty because we are not equipped with the documents including the statement recorded by the Investigating Officer, but the contradiction brought on record being the circumstance that the version of this witness initially before the police was that he had given vardhi to Police Head Constable Adambhai. This Adambhai has not been examined by the police for the reasons best known to the prosecuting agency. However, it is clear from the evidence of PW 29 Keshavsinh Kanpuri (Exh.72) that on 21.2.1984 when he was on duty at Ellisbridge Police Station and was in-charge of Investigation Cell of the Police Station, Police Head Constable Adambhai Alibhai who was at VS Hospital on duty as hospital duty constable gave one written vardhi / information at about 11.50 a.m. The original vardhi book was brought by him and he has produced and proved vardhi which is at Exh.73. This document Exh.73 clearly states that vardhi was given by Adambhai Alibhai – Buckle No.3194 as per the order of Dr.Bharat Solanki and he had given vardhi from the

VS Hospital. This vardhi reveals the first story that was revealed before Dr.Bharat Solanki by the persons who had brought Firozbhai to VS Hospital. The time of incident is also indicated in the vardhi that of 5.00 to 5.30 hours on 21.2.1984. The place of incident is also found mentioned in the vardhi and the place is shown to be on the road between Vallabhipur and Dhasa. The Ellisbridge Police was informed at the instance of Dr.Solanki and the information received by him that car was intercepted and unknown persons had fired and caused injury and injured was brought for the purpose of treatment by Ismailbhai and Ashrafkhan and as per the contents of this vardhi, Dr.Solanki had declared Firozbhai dead at 10.30 i.e., at the time when he was brought to the hospital and Ellisbridge Police was asked to do needful. The statement of the accused made to the police in the nature of FIR even is not there on record. The statement made by the accused persons i.e., accused Nos.1 and 3 before Dr.Bharat Solanki could have been brought on record through the evidence of Dr.Bharat Solanki or by proving contradiction and examining Head Constable Adambhai Alibhai. The approach of the Public Prosecutor and learned Presiding Judge of the Court is even very

very casual. Adambhai could have been examined by the prosecution and he could have led the evidence that Dr.Bharat Solanki had dictated vardhi. It was possible for this witness to prove vardhi book maintained by the Police Head Constable on duty at VS Hospital. How and why an attempt to put curtain on this part of evidence is made is a question, but we are unable to answer the same. But, it is possible for us to observe that absence of this vital part of evidence is not able to create gap in the chain of circumstances which can create shadow of doubt about involvement of accused Nos.1 and 3 in the incident, because the evidence of PSI Mr.Kanpuri is sufficient to establish the presence of both the accused in the hospital. If the same is read in reference to the evidence of the persons who had collected number of muddamal articles from the motor car that was lying in the hospital wherein the deceased was brought to the hospital. The description of the car has not been specifically proved by the panchas, but PSI Mr.Kanpuri has stated that he had immediately written to the hospital within 5 to 7 minutes and had drawn inquest panchnama between 12.00 and 12.30 p.m. This inquest panchnama is at Exh.27. It is important to note that this document Exh.27 is received in

evidence on admission of the counsel appearing for the accused during trial like other documents Exhs.28, 29, 30 and postmortem note Exh.40. Meaning thereby, the contents of inquest panchnama is not disputed and the document can be read in evidence being an admitted document. In this panchnama, contents of vardhi exh.73 are mentioned in opening para, means the contents of vardhi Exh.73 gets corroboration from this admitted document inquest report. The inquest report describes the nature of injury along with other details. Therefore, there was no reason for Dr.Bharat Solanki to put curtain on the names of the persons who had brought Firozbhai to the hospital and his act of giving vardhi to Police Head Constable Adambhai.

40. The motor car was kept and examined. Finger Print Expert Mr.Vaghela was called by Mr.Kanpuri. Various muddamal articles which were article Nos.17 to 32 recovered from the motor car in the hospital itself show the presence of car in the hospital. The ownership of the car was of accused No.3 is undisputed. In the hospital itself, after close observation of the car, hand-wash of accused Nos.1 and 3 were taken. In the same way, blood samples

were also taken from the rear seat of the motor car. He has denied that when he reached to the hospital, nobody concerning the case was present. On the contrary, he has stated that Ashrafkhan and Ismailbhai i.e., accused Nos.1 and 3 were standing near the police table. This witness has stated that Head Constable Adambhai is sick and, therefore, he is on leave, means on 13.2.1986 when the deposition of this witness was recorded by the Court, this witness Adambhai was on sick leave. The evidence of Adambhai and sincerity towards duty by Dr.Bharat Solanki could have added more strength to the case of prosecution. It does not go in the root of the strength of the case of the prosecution. However, this evidence satisfactorily brings one circumstance on record that Inspector Mr.Kanpuri and Ellisbridge Police authorities were misled by the persons who had brought Firozbhai in the hospital.

41. As discussed, Firozbhai was found dead at 10.30 a.m., when he was brought in the hospital. This fact has not been seriously disputed. The time of death, therefore, according to us, is relevant that by what point of time the deceased must have succumbed to the injuries. The deposition of Doctor

who supervised the postmortem as Senior Doctor has clearly stated that rigor mortis was present on all over the body. This version was supported by the remarks made in column 11 of the admitted document Exh.14 postmortem note. Exh.14 is the postmortem note prepared by PW 4 Dr.Ms.Pratima desai – Exh.23. As per this witness as well as document exh.14, postmortem was performed between 3.00 p.m., and 5.00 p.m., on 21.2.1984. So, the Court can take notice that in the month of February in Gujarat and more particularly in Ahmedabad atmosphere is not remaining hot. The temperature must be of passing winter. Even then, it is mentioned in column 12 of the postmortem note that “PM lividity is slightly visible on back and buttocks”. The deceased was well nourished person and the stomach was found with 50 cc of semi-digested fluid with no particular smell. So, in absence of evidence as to when the deceased has taken his last meal, it was possible for the trial Court to record the finding as to the probable time of death because it is accepted principles of medical jurisprudence that after death, the body being begins to lose its animal heat by conduction, convection and radiation and gradually attains the same temperature as its surrounding medium similar to

all inert objects. The rate of cooling may not be uniform. The body at the time of postmortem was found cool. As the Doctors were able to notice postmortem lividity at two parts of the body and rigor mortis was found on the whole body, the Doctors could have opined about the probable time of death. However, no pointed question was asked to any of two Doctors examined. But, as per the medical jurisprudence in temperate region rigor mortis usually lost for 2 to 3 days. In northern India usual duration of rigor mortis is 24 to 48 hours in winter and 18 to 36 hours in summer. It is observed by the expert that cases have occurred in which rigor mortis developed and disappeared within hour and half after death. But, it is possible in the present case to observe on the strength of established principles of medical jurisprudence that, in general, rigor mortis stays in 1 and 2 hours after death and is well developed from the head to foot in about 12 hours. Whether rigor mortis is in developing phase, established phase or maintained phase is decided by the society. The finding like marbling right lower abdominal discolouration, tense or stout state of abdomen etc. So, in the present case, the body was taken up for postmortem etc., at 3.00 p.m., then in all

probabilities the death must have occurred at any time between 3.00 a.m.,and 5.00 a.m., on 21st February means in the early hours of 21st February. So the time of alleged incident that was disclosed initially before Dr.Bharat Kothari by the persons who brought the dead body also appears to be not correct time. It is difficult for the Court to accept that the persons who were accompanying the body of Firozbhai in the motor car must not have known that he is dead and they are simply carrying the dead body to the hospital. The accused no.3 has attempted that he was driving the car and in his car the body was brought to the hospital is proved fact. In such a situation when accused nos.1 and 3 were seen last in the company of the deceased and they are the persons who had brought the dead body to the hospital, then explanation given by them as to the accidental fire of the gun whether could have been accepted by the trial Court or not is the main question argued before us. The opinion of doctor that the injury found on the body of the deceased could have been sustained accidentally would not help the accused because the gun shot whether was accidental or intentional requires to be decided on number of other cited facts. In case of even suicidal injury by fire arm,

it is possible to impeach that some body has killed the deceased. So, the doctor who performed the post-mortem in fire injury case has very limited contribution as to how the deceased could have sustained the injury. We have seen one case of Assam High Court reported in **AIR 1962 Assam 62,** where the defence of the accused was that gun went off accidentally but on the strength of other evidence, the Court held that the say of the accused is not reliable. Of course, in the case before the Assam High Court **Jogendra Nath Banthao V/s The State,** the question before the Court was that part of the statement made by the accused to the Court whether can be relied on or not. It was argued that if the statement of the accused is to be accepted recorded under Section 342 of the Code (old) then it should be accepted as a whole or it should be rejected in toto. The High Court held that there is no bar in relying on the part of it and the Court found that the accused has accepted his presence at the spot of incident by putting defence that gun suddenly went off and the injury sustained by the deceased, therefore, was accidental. In the case on hand, the say of accused no.3 is that he was all the while

driving the car and there was no scope for him to use the gun meaning thereby, at least, he should be exonerated. It appears that considering the presence of nitrate in the hand wash of accused no.1, accused no.3 has attempted to place the defence that at least he should not be linked with the injury found on the body of the person deceased even if it is found to be accidental or otherwise or for the reasons best known to him. But the fact remains that he has accepted his presence at the spot of the incident. It is satisfactorily established by the prosecution that the deceased sustained injury when he was in the car. There were enough blood stains in the car and it is not the case of the prosecution that the deceased was dragged out of the car and thereafter he was killed. Learned trial Judge, therefore, had no reason to jump to a conclusion on hazy evidence which cannot be said to be even the opinion evidence of P.W.Mr.Barot that he has given after lapse of some days from the date of his earlier examination or the opinion of Dr.Kothari. When the detailed opinion with the report of Mr.Barot was available on record that there was no scope for accidental fire of very gun on any jolt or jerk. The evidence of Mr.Jhala in this regard is not the evidence in eye of law because he

has attempted to show that some police officer had revealed the fact of accidental fire or had given the information about the death on account of accidental fire, he has not given the name of that officer. If the informant was the police officer then he cannot be equated with Batmidar whose name could have been concealed. If such irresponsible answer is accepted as a part of valid evidence then the police official can exonerate or implicate anybody at any time even in a serious case. The evidence, therefore, of Mr.Jhala that he had learnt from somebody that the death of the deceased was because of accidental fire can be said to be hearsay evidence and, therefore, inadmissible. We have reason to believe that the investigation carried out by Mr.Jhala ultimately could not take correct and perfect direction or the zeal which is very much required in the investigation of a grave offence. Therefore, certain areas have not been either investigated or some important documents were not collected properly from the V.S.Hospital, F.S.L.Report and the books of accounts of the deceased. The statements of Savarkundla customers who had purchased the tyres on intervention of accused no.3 also could have thrown some light on the point of motive.

42. When the learned trial Judge has accepted that there is sufficient evidence as to the proof of ownership of the car and the accused i.e., owner of the car has accepted that he himself was driver of the car and the involvement of the car in question is established by other piece of evidence mentioned hereinabove and accused no.3 himself has accepted many relevant aspects on this point, no weightage could have been given as to dissimilarity of tyre marks while evaluating circumstance “G”. According to us, it was necessary in the present case to consider the opinion as to the examination of blood of the deceased in reference to the percentage of alcohol. Under the influence of alcohol the deceased himself whether could have triggered the loaded gun was the point but it was never placed before the Court. According to us, it is not the defence nor the probability of occurrence of this accident, otherwise, accused nos.1 and 3 along with the owner of the gun could have rushed to the hospital immediately. If the claim of accused nos.1 and 3 is that the deceased was their friend and accused no.3 claims that he was also helping him in developing the business of the deceased, then all the three could

have made hue and cry and sought help from the people of nearby villages. They could have taken the injured to the nearest doctor first. That could be the formal conduct and they could not have taken about 6-7 hours in reaching the V.S.Hospital, Ahmedabad. Of course, there is no opinion evidence in this regard but the Court cannot ignore pharmacological effect of alcohol on human body. It is not suggested to the wife of the deceased or the brother of the deceased that the deceased was alcoholic and was drunkard and he had capacity to consume excessive drink. It must be kept in mind that alcohol passed into the blood stream can effect the behaviour. There are possibilities of diffusion of alcohol from the stomach into the blood and tissues even after the death. As observed earlier, the doctor who performed the post-mortem was not able to trace any alcohol in the stomach otherwise, he could have mentioned. There is no reference of the presence of alcohol or no such liquid in the relevant column. We have carefully considered the totality of equivalent method of expressing centre of alcohol of tissues in the background of average specific gravity of alcohol. It is true that alcohol acts differently on different individual and also on some individual at different

times. High percentage of alcohol found in the blood report i.e., Exh.102 that the deceased at the time of death must be under heavy influence of alcohol. We would like to reproduce some portion from the book of **Modi's Medical Jurisprudence and Toxicology, Twenty third edition** page nos. 312 and 313 of Section II Toxicology :

> “A moderate dose of alcohol has only a slight accelerating effect on the heart rate but when the concentration reaches about 400 mg per cent, the heart rate decreases and if it reaches above 600 mg per cent, the vital centres in the medulla are depressed and the respiration and heart stops. About half to one ounce of alcohol can raise the blood pressure by about 5 to 10 mm Hg for a short time. Alcohol does not dilate coronary arteries. However, it has a depressant action on the central nervous system, the initial effect of euphoric exaltation, eloquence, self-confidence, impulsive behaviour and daring is a result of the removal of inhibitions due to the release of

the lower centres from the control of the higher centres. Actually, the finer grades of attention, reflection, judgment, concentration and self-control are first lost and this may lead the person to anti-social acts. It makes him less sensitive to and less aware of sensory stimuli. Impairment of vision begins at concentrations of 20 to 30 mg per cent in moderate drinkers and 40 to 70 mg per cent in heavy drinkers and at 10 to 20 mg percent in non-drinkers. Alcohol increases the auditory threshold i.e., without it they can perceive or differentiate at lower intensity. Its effect on voluntary muscles is to lower the efficiency of muscular performance at about 35 mg percent and at higher concentrations of 100 to 200 mg per cent, even the reaction time is lengthened i.e., a drunk motor driver cannot apply his brakes as promptly as when he is sober and hence may cause an accident. It may cause acceleration of the heart rate at moderate blood concentration. There is vasodilatation and peripheral circulation

increases, resulting in a feeling of warmth, but at the same time there will be a loss of body heat from the skin. In cold ambient temperatures, this effect is very important.

At higher or toxic levels, vital centres in the medulla will be depressed and there will be cardiovascular depression."

43. We are aware that the Court cannot use the opinion of the expert expressed and reflected in the book of the subject related unless it is specifically brought to the notice of the experts examined on the point because the opinion expressed by the experts in their book or article has the basis of their own finding of the study of the case that they have come across. In the present case, no attempt was made either by the prosecution or by the defence counsel as to the percentage of methyl alcohol found in the body of the present deceased. It was submitted before the trial Court that the present case is of accidental fire and the learned trial Judge has accepted that gun may have got fired accidental, then this Court as a Court of appeal is supposed to consider all aspects from different angles like

whether probability of self-defence is emerging from the evidence led by the prosecution. Even, no such defence has been placed by the accused during the course of cross-examination of the witness or in the statement under Section 313 of the Code. Our Court including the Apex Court have laid down that the probable defence if even is emerging from the total evidence led by the prosecution, then to test the strength of the prosecution case on the point of guilt of the accused, the Court is supposed to consider all other relevant aspects and from that point of view, we have done the exercise to go through the relevant book written by the expert mentioned hereinabove and have tried to peep into the subject of pharmacological effect of alcohol including ethyl alcohol etc. We have observed that there is no evidence that all accused or any person other than the deceased was drunk nor it is the say or statement of the accused. No container including bottle has been recovered from the car or from the place of incident and there is nothing on record to show that when the deceased left in the company of accused Nos.1 and 3 from the office of accused No.3, he was in drunken condition. The alcoholic drunkard had practically absorbed from stomach. It is

possible to co-relate time of departure of deceased in the company of accused Nos.1 and 3 and probable time of death. As mentioned earlier, there is some scope of absorption of alcohol even after death. Of course, there is no reference as to how much percentage of alcohol would get absorbed after death, but it is inferable that some liquid was found in stomach when the postmortem was performed. The accused have been charged for conspiracy punishable under Section 120-B of IPC. The Investigating Agency has not done any work after receipt of the report from the FSL as to the percentage of alcohol found from the sample of the blood of the person deceased Firozbhai. In the early hours after mid-night of 20th any time between 3.00 a.m., and 5.00 a.m., the incident has occurred. It is possible for us, in the present case, to hold that gun shot injury must have been caused when the deceased must be in sound sleep after consumption of alcoholic drink. In such condition, he could not have handled the gun. If the car is moving on unfit surface and on very rough track, then somebody else than the deceased must have caught hold the gun. So, there is no even remote possibility of accidental fire at the instance of deceased himself because to trigger the loaded gun

having safety catch and also trigger guard, one will have to make conscious effort. The finger or thumb need to be inserted between trigger guard and trigger. This situation obviously must have been considered by expert Mr.Barot while expressing opinion that on account of jerk or jolt, muddamal gun could not get fired considering the probable distance that was there at the time of fire. In the present case, it is not possible for the Court even to imagine that under the intoxicated condition of deceased, he might have sustained injury on account of his own wrong or mistake committed when the presence of nitrate is found in the hands of one of the accused i.e., accused No.1 is the circumstance which rules out the possibility of fire by the deceased himself. The entry wound as described by the Doctor in postmortem note Exh.14 is a clear cut entry wound fired from close range. The entry wound when was not found as irregular close angle wound at the time of postmortem is also one situation which rules out possibility of fire by deceased himself in intoxicated condition. No such suggestion even is made to any of the prosecution witnesses.

44. The accused No.3 when has tried to place his

defence as if he has unfolded true story, it was not impossible for him to state specifically that as the deceased was in drunken condition, he could not control the loaded gun because of his own conduct and abnormal physical behaviour got triggered. In the probability in which the deceased might have sustained the injury for his conduct in intoxicated condition, then as observed earlier, the accused persons would have rushed to the nearby Doctor or directly to the hospital because the distance between the place of incident and the VS Hospital is of 75 to 80 kms and it is possible to reach to the hospital within 1 and ½ hours maximum, in emergency condition.

45. The case placed by accused Nos.1 and 2 before the Court is of denial in a statement under Section 313 of the Code. But, an attempt was made by the counsel appearing for all three accused to impress upon the Court that fire was accidental or it might be accidental fire. It is rightly argued by Mr.K.C.Shah, learned APP that the evidence led by the prosecution suggests that the defence taken by the accused persons is false. It is true that accused are not even supposed to reply and can keep their mouth shut. The prosecution is supposed to establish

the case beyond the reasonable doubt. But, if the accused put the case of denial or attempt to make out a particular case by raising a specific plea while explaining incriminating evidence led by the prosecution, the element of falsity if is emerging, then it can be used as circumstance against the accused who raised false plea even on denial and the Court can say that no reasonable explanation is coming forthwith qua incriminating evidence led by the prosecution while recording finding or at the time of evaluating the case of evidence of prosecution.

46. It is possible for this Court, in the present case, even to observe that accused Nos.1 and 3 were the persons who brought the deceased Firozbhai to the VS Hospital and no third person has been either referred or mentioned in the present case who could have brought the injured person to the VS Hospital than these two accused persons. So, the history ultimately which had reached to Ellisbridge Police must be out-come of the declaration made by the persons who had brought Firozbhai. There was no reason for Dr.Bharat Solanki to tell innovative story to the hospital duty Head Constable nor hospital duty

Head Constable had reason to concoct the story while giving vardhi to Ellisbridge Police Station as to how the deceased sustained injury and where. So, according to us, this false declaration made by the persons who brought the dead body of Firozbhai to the VS Hospital can be made use of as circumstance against the accused Nos.1 and 3 by the prosecution.

47. According to us, finding recorded by the learned trial Judge qua circumstances (points) framed by the trial Court “E”, “F”, “G” and “H” are neither perfect nor logical or legal. Except some finding like ownership of the car, the reasons assigned by the learned trial Judge and finding recorded are found erroneous and based on incorrect and illegal appreciation of evidence.

48. The decision in the case of **State of U.P. V/s Gambhir Singh and others,** reported in **(2006)1 SCC (Cri.)125** would not help the accused because the Apex Court was dealing with the acquittal appeal where the High Court had acquitted the accused saying that it is not safe to rely on the testimony of P.W.1 because he was animus against the accused and the presence of

P.W.2 at the time of occurrence was doubtful on the facts and circumstances and, therefore, the Apex Court has held that the view taken by the High Court is one possible view. The Apex Court has said that it may also be possible to take a view in favour of the prosecution but when the other view is also possible then acquittal should not be interfered. We have observed hereinabove that the finding recorded by the learned trial Judge on all material points is erroneous and has the element of perversity because material relevant parts have been ignored while recording the finding. Another decision in the case of **Vijai Singh V/s State of U.P.,** reported in **(2006)1 SCC (Cri.)627** cited by Ms.Ami Yagnik also would not help the accused. It is true that number of lapses and infirmities are there in the investigation and also in conduction of trial but it is not possible for us to observe that these lapses or infirmities are fatal. On the contrary, some vigilance and meticulous would have strengthened the case of the prosecution more. It is also necessary to observe that these lapses or infirmities are not capable of causing any prejudice to the accused persons. In this cited decision muddamal bullet recovered was not

examined by the Ballistic expert. The Apex Court has confirmed the conviction of one of the three accused but dismissed the appeal against the order of acquittal saying that the grounds which weighed with the High Court in acquitting the accused are not perverse. Unless the judgment of acquittal is found to be perverse, the Appellate Court should not interfere with the same. As discussed hereinabove, according to us, the crucial findings in the present case are based on incorrect and erroneous appreciation of evidence. The third decision cited by Ms.Yagnik in the case of **State of U.P.V/s Lalloo Singh,** reported in **AIR 1986 576** is based on accepted principles. The Apex Court was dealing with the appeal under Article 136 of the Constitution and has observed that when two views are possible and the reasons given are not perverse or wholly unsound the acquittal should not be reversed. In this cited decision, the Apex Court was dealing with the acquittal recorded by the High Court based on the valid reasons. The reasons given by the trial Court holding two accused guilty were fairly sound. However, the High Court acquitted both the accused and the reasons recorded by the High Court were also

sound. When it was not possible for the Apex Court to record that the reasons assigned by the High Court can be termed or characterized as perverse or wholly unsound, the Apex Court confirmed the acquittal. We have gone through the facts of the case cited. When it was possible for both the Courts to record sound reasons and, therefore, acquittal was not reversed by the Apex Court. Here in the present case, according to us, reasons assigned by the learned trial Judge while observing that the chain of circumstances has remained unestablished and the material link between the circumstances is missing is erroneous and only the possible view in the present case that could have been recorded was of guilt of the accused persons. In the case of **State of Gujarat V/s Rasulmiyan Ahmedmiyan Malek and others,** reported in **JT 1990(2)SC 128,** the Apex Court has observed that both the Courts below have given sound reasons in acquitting the accused. It was a case of concurrent finding of the Courts below that the evidence of witnesses does not inspire confidence. Here in the present case, so far some of the circumstances are concerned the version of the witnesses examined by the prosecution have been found trustworthy by the learned trial Court

and, therefore, it has been held that accused nos.1 and 3 in the company of the deceased when they left the office of accused no.3 from Sarkhej and had left for Savarkundla on 20.2.1984. In the same way, substantive part of the evidence of the doctor and the Ballistic expert (opinion evidence) have been considered positively and in favour of the prosecution to some extent. When the Court found that the reasons given by the trial Court for accidental fire are not sound, this decision would not help the accused.

49. The ratio of the decision in the case of **Khedu Mohton and others V/s State of Bihar,** reported in **AIR 1971 SC 66** pointed out by Ms.Yagnik is in reference to the powers of the High Court in considering the evidence on record in the appeal under Section 417 of the Code (old). It is true that the presence of innocence gets more strength on the finding of acquittal and unless the conclusion reached by the acquitting Court is palpably wrong or based on erroneous view of the law or that the decision is likely to result in grave injustice, the High Court should be reluctant to interfere with the

conclusion. Here we would like to discuss this legal aspect brought before us by Ms.Yagnik. In the present case, the Court is dealing with the case based on the circumstantial evidence and as per the settled legal position, the Court is under the legal obligation to reach to a finding that the guilt of the accused is satisfactorily established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

50. It is well settled that although in an appeal from an order of acquittal the powers of the High Court to reassess the evidence and reach its own conclusion are as extensive as in appeal against the order of conviction, yet, as a rule of prudence, it should always give proper weight and consideration to

certain aspects and reappreciate the evidence. So in all cases, if the main grounds on which the Court below has based its order acquitting the accused are reasonable and plausible and cannot be entirely or effectively dislodged or demolished, the High Court should not disturb the acquittal. However, it is not a matter of doubt that the appellate Court has full powers to review an order of acquittal and to come to its own conclusion in appeal against the acquittal. If the Court is capable of observing that the finding recorded by the learned trial Judge of acquittal is patently illegal or perverse. We are supposed to express reasons that how the finding of acquittal is factually or legally erroneous or can be said to be palpably wrong. Manifestly wrong order of acquittal leading to miscarriage of justice cannot be upheld and learned Additional Public Prosecutor Mr.K.C. Shah has rightly placed reliance on the observations made by the Apex Court in the case of Karnail Singh (supra). In the case of ***Main Pal and another v. State of Haryana and others,*** *reported in* ***2004 AIR SCW 2140***, the Apex Court has observed that the High Court was justified in undertaking the reappreciation of evidence and holding the accused

guilty. The paramount consideration of the Court is to ensure that the miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from conviction of an innocent. In a case where admissible trustworthy evidence is ignored, a duty is cast upon the Appellate Court to reappreciate the evidence.

51. Mr.K.C. Shah, learned Additional Public Prosecutor, has also relied upon the decision in the case of ***State of Madhya Pradesh v. Dharkole alias Govind Singh and others***, *reported in* ***AIR 2005 SC 44***, the Apex Court while reversing the order of acquittal in paragraph nos.11 and 12 have observed as under:

> "11. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed

to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and commonsense. It must grow out of the evidence in the case.

12. The concepts of probability, and the degrees of it, cannot obviously be expressed in terms of units to be mathematically enumerated as to how many of such units constitute proof beyond reasonable doubt. There is an unmistakable subjective element in the evaluation of the degrees of probability and the quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and, ultimately, on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uninformed legitimization of trivialities would make a mockery of administration of criminal justice. This position was illuminatingly stated by Venkatachaliah, J. (as His Lordships then was) in State of U.P.

v. Krishna Gopal and Anr. (AIR 1988 SC 2154).”

52. It is true that in para 31 of the judgment in the case of **State of Punjab V/s Baldev Singh,** reported in **1999 SCC (Cri) 1080,** the Apex Court has observed in para 31 thus :

> “There is indeed a need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed.”

53. But these observations would not be of much

use to the accused. Learned trial Judge under erroneous appreciation of evidence has created a shadow of doubt and while developing the reasons for recording the scope of accidental fire has taken into account some inadmissible evidence and ignorable part of evidence of Ballistic expert as well as P.W.Dr.Kothari. The case was required to be appreciated in light of the opinion expressed by two doctors and certain undisputed facts vis-a-vis the statement made by the accused in his examination under Section 313 of the Code. The FSL report also corroborates the case of the prosecution in substantia. In that fact situation, certain infirmities and carelessness found from the record on the part of the Investigating Agency, Public Prosecutor and the learned Judge do not create any shadow of doubt at all. We have already observed earlier that some vigilance or meticulousness could have added more strength to the case of the prosecution.

54. Mr.Champaneri has placed reliance on five different decisions of the Apex Court and we would like to deal with all these decisions separately.

(a) In the case of **State of U.P. V/s Shri Krishan,** reported in **(2005)10 SCC 399,** the Apex Court has observed that even if on the basis of the same evidence, two views are possible, the Appellate Court will not be justified in reversing the order of acquittal if the same is based on evidence on record and the view taken is a possible reasonable view of the evidence. In this cited decision, the Apex Court confirmed that failure to hold TI parade although an order to that effect was passed pursuant to an application moved by one of the accused claiming that he should be identified by deceased's wife is serious infirmity. It was also observed that the High Court was right in saying that implicit reliance should not be placed on testimony of deceased's wife and two eye witnesses were declared hostile. Here, the present case is based on circumstantial evidence and hostility of some witnesses are not found sufficient to break the chain of circumstances which is required to be established in such cases.

(b) In the case of **T.Subramanian Vs. State of T.N.,** reported in **(2006) 1 SCC 401** the Apex Court reiterated very principle while dealing with an

appeal filed by the accused convict who was already acquitted by the High Court under Section 5(1)(d) read with Section 5(2) of Prevention of Corruption Act, 1947. The trial Court had acquitted the accused observing that the accused succeeded in proving their case by preponderance of probabilities. The High Court reversed the acquittal without observing that view taken by the trial Court was perverse or erroneous. It is held by the Apex Court that the High Court erred in reappreciating very same evidence and coming to contrary conclusion. Here, according to us, in the present case, finding recorded by the trial Court that the chain of circumstance has remained unestablished and key circumstances have not been proved by legal evidence and to the satisfaction of the Court are the finding based on erroneous appreciation of evidence and it suffers with perversity. In such or similar cases an attempt by the Appellate Court should be of reappreciating the evidence only with a view to focus error committed by the trial Court and to point out the area where this error has affected and / or impact of perversity. The facts of the cited case were materially different than the facts of the case on hand and according to us, ratio therefore will not help the accused.

(c) In the case of **State of Punjab V/s Ajaib Singh and others,** reported in **(2005) 9 SCC 94,** the Apex Court in para 10 has observed that reappreciation of the evidence on record by the Apex Court is permissible, but unless the acquittal found to be unreasonable or perverse, no interference is called for. It is held by the Apex Court that acquittal ought not to have been interfered with. In this cited decision, the Apex Court found that the case is of delayed FIR and there is no evidence of cogent nature as to recovery of the weapon at the instance of the accused. There was no clear opinion from the FSL as to group of blood after serological examination. The facts are materially different; the case on hand is based on circumstantial evidence. On the contrary, observations made by the Apex Court would help the prosecution and it is argued by Mr.Shah, learned APP that this is a fit case where this Court should reappreciate the evidence as findings are perverse.

(d) It is not necessary to observe the details of the case of Gambhir Singh and others (supra) i.e., fourth decision cited by Mr.Champaneri because we

have already discussed about this decision while dealing with the authority cited by Ms.Ami Yagnik.

(e) In the decision in the case of **Narendra Singh and another V/s State of M.P.,** reported in **(2004)10 SCC 699** the Apex Court acquitted the accused saying that “we, thus, having regard to the post-mortem report, are of the opinion that the cause of death of Bimlabai although is shrouded in mystery but benefit thereof must go to the appellants as in the event of there being two possible views, the one supporting the accused should be upheld.” In this cited decision, the case of the prosecution was based entirely on circumstantial evidence. Four accused persons i.e., husband, mother-in-law, father-in-law and sister-in-law of the deceased were tried for committing the murder of the deceased by throttling and thereafter causing disappearance of the evidence by setting her on fire. The dead body of the deceased was found lying in the kitchen. The trial Court disbelieved the prosecution case. It was observed by the trial Court that door of the kitchen had to be broken open. As the incident presumably took place in between 4.15 p.m., and 5.30 p.m., it was impossible

for the assailant to escape out of the window of the kitchen. Presuming that it was a case of murder, the trial Court wondered keeping in view the place of occurrence vis-a-vis the point of possible entry thereto as to how the assailant made his exodus. The trial Court did not fully rely upon the post-mortem report having regard to certain cuttings and over writings action. It was further held that the plea of alibi of the accused person could neither be ignored nor said to be unreliable. The High Court in appeal reversed the acquittal and convicted the accused (a) husband (b) mother-in-law and (c) sister-in-law, however, confirmed the acquittal of father-in-law. So, the facts of the case of Narendra Singh (supra) are so different than the facts of the present case. So, we are not inclined to state as to how this would help the accused in any way.

55. On the other-hand, it is rightly submitted by learned APP Mr.K.C.Shah that ratio of the decision in the case of **State of U.P. Vs. Satish** should be applied. In this cited decision reported in **2005 Cr.L.J.1428** the Apex Court has observed thus in para 25 that :

“25. .. .. .. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re-appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. (See Bhagwan Singh and others v. State of Madhya Pradesh (2002 (2) Supreme 567). The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there

> are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. .. .."

56. The above observation is the direct reply to the authorities cited on behalf of the respondent-accused referred to hereinabove.

57. One more decision cited by learned APP in response to the arguments advanced by the learned advocates for the accused persons require to be discussed i.e., in the case of **Lekhraj @ Hari Singh Vs. State of Gujarat,** reported in **1999(1) GLR 361** wherein the Apex Court has observed that "This Court has not held that in the absence of any motive an accused cannot be convicted under Section 302 I.P.C." Mr.Shah has taken us through the entire judgment. The case of the prosecution was based on circumstantial evidence. After referring earlier judgment in the case of **Surinder Pal Jain Vs. Delhi**

Administration, 1993 Supp.(3) SCC 681, it is observed that even in absence of motive, the accused can be convicted on the basis of circumstantial evidence. In this decision, the prosecution has established that the accused and deceased had come to the house and stayed together. The accused left in the morning alone. The dead body was found from the house and the accused ultimately was held guilty by the High Court on reversal of acquittal. In the present case, accused Nos.1 and 3 had left in one car in the company of deceased from Sarkhej on 20.2.1984 and that too at night hours and thereafter, both these accused persons had brought the dead body of the person deceased and there is ample evidence on record to show that the deceased met with unnatural death while in the very car. The deceased, therefore, last seen in the very car in the company of accused Nos.1 and 3 and, there is sufficient circumstantial evidence to show that accused No.2 had joined the company of accused Nos.1 and 3. The second decision cited by Mr.K.C.Shah in the case of **Mohibur Rahman and another V/s State of Assam,** reported in **(2002)6 SCC 715** would help the prosecution. This cited decision is also of a case based on circumstantial

evidence. In all cases where the prosecution wants to rely on such circumstances of “last seen together” then the prosecution has to establish close proximity between the event of the accused last seen together with the deceased and the factum of death of the deceased. Here in the present case, there is sufficient evidence as observed hereinabove where the event of last seen together is within close proximity. It is satisfactorily established that accused nos.1 and 3 were last seen together with the deceased before some hours of midnight on 20.2.1984 and as per the evidence the deceased died in the very vehicle wherein the accused and the deceased were seen in couple of hours that too by gun shot injury. It is not necessary to reproduce relevant paras 11 and 12 wherein the Apex Court has recorded the reasons.

58. According to Mr.Shah, the ratio of the decision in the case of **Rabari Khima Ganda V/s State of Gujarat,** reported in **20 GLR 847** would positively help the prosecution and the application given by the wife of the deceased at belated stage should not be viewed with any doubt. The application given to

Mr.Bhaya treated as FIR in the present case was nothing but anxiety expressed by the widow stating her grievance as nothing was moving in a correct direction. It is very likely that she might have felt that some hanky-panky is going on and she may not get justice being the real victim of the crime. It was even possible for the police to file the charge sheet on the strength of the complaint / application given to Ellisbridge Police Station with the detailed report stating that accused had given false information to Ellisbridge Police Station. In this cited decision, counter complaint by the accused persons given voluntarily and not in the course of examination of the accused under Section 161 (1) of the Code if given with a view to action being taken on it by the police would amount to the FIR under Section 154 of different cognizable offence notwithstanding the fact that investigation against the accused has already started on the complaint made by the other side. However, according to us, for want of production of the complaint registered by Ellisbridge Police during the course of trial and non-examination of the police head-constable to whom the history given to the hospital authorities was disclosed for the first time takes us to the

conclusion that the decision would not help the prosecution much.

59. The decision in the case of **State of Punjab V/s Karnail Singh,** reported in **(2003)11 SCC 271** establishes the principle which requires to be followed by the appellate Court while considering the appeal against the judgment of acquittal. In para 6, it is observed thus :

> "There is no embargo on the appellate court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the court is to ensure that

> miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate court to reappreciate the evidence even where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused committed any offence or not. (See Bhagwan Singh V.State of M.P.) The principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable, it is a compelling reason for interference. These aspects were highlighted by this Court in Shivaji Sahabrao Bobade V.State of Maharashtra, Ramesh Babulal Doshi V.State of Gujarat and Jaswant Singh V.State of Haryana."

60. Of course, we have discussed admissibility and reliability of exculpatory statement of the

accused made and whether part of the statement of the accused can be considered by the Court while appreciating the strength of the case of the prosecution. The decision of the Apex Court in the case of Hanumant V/s State of Madhya Pradesh has been distinguished and discussed by the Apex Court in the case of **Nishi Kant Jha V/s State of Bihar,** reported in **AIR 1969 SC 422.** Referring this very decision in the case of Nishi Kant Jha, the Apex Court in subsequent decision in the case of **Sampat Singh V/s State of Rajasthan,** reported in **AIR 1969 SC 956** has held on facts in para 9 that :

> "In our view, both courts, on the facts, were justified in coming to the conclusion that the appellant had exceeded his right of private defence. Neither court had relied only on the statement of the appellant under Section 342 Criminal Procedure Code to arrive at its finding. There was sufficient other evidence including the injury report and the testimony of Dr.Ojha to warrant the conclusion that the right of private defence had been exceeded and the appellant was

rightly convicted under Section 304, Part II, I.P.C. In Nishi Kant Jha V.State of Bihar Cr.A.No.190(N) of 1966, D/- 2.12.1968 = AIR 1969 SC 422 it was held by this Court that the court may rely on a portion of the statement of the accused and find him guilty in consideration of the other evidence against him led by the prosecution. In that case, there were no eye-witnesses to the commission of the crime and the evidence was all circumstantial and the statement of the accused that he was present at the scene of the crime was a vital circumstance which taken in conjunction with other circumstances led the court to come to the conclusion that he was guilty of the crime imputed to him.....”

61. In the same way, the Apex Court in the case of **Mohanlal and others V/s Ajit Singh** and others following the decision in the case of Nishi Kant Jha (supra) has reiterated the principle that if the evidence on record disproves the exculpatory part of the statement of the accused in the trial Court, it is clearly permissible to accept that part of the

statement which occurs with the evidence on record and the Court can act upon it. According to us, this accepted vital principle of law was ignored by the trial Court while appreciating the evidence and evaluating the strength of the case of the prosecution and while visualizing the chain of circumstances placed by the prosecution.

Here we would like to reproduce the relevant part of the judgment of this Court (Coram : C.K.Buch and K.A.Puj, JJ) in the case of State of Gujarat V/s Narayan Shastry Guru Omprakashdasji and others decided on 1.9.2006, wherein it is observed that :

> "(l) In case of **K.Purshothaman v/s State of Kerala, (2005)12 SCC 631,** the Apex Court was dealing with the case where the appellant accused was dealing with a case where the appellant accused was found involved in the offence punishable under sections 120-A, 120-B, 403 and 477-A of IPC. On close reading of the ratio propounded by the Apex Court in the above decision and particularly in paras 10 to 15, 18 & 19, this Court is of the opinion that the same,

probably, would help accused No.4 Ghanshyam Prakashdasji Swami because the case of the prosecution against the appellant accused was that he had accompanied original accused No.3 who was actually entrusted the gold of “DEVASWOM BOARD”. The gist of the finding of the decision is given by the Apex Court in paras 18 & 19 of the said decision. It would be relevant to reproduce the same:-

“18. From the findings arrived at by the High Court that it was A-3 who was entrusted with the gold by the Devaswom Board, and who was looking after the affairs of making the ornament golaka, simply because the accused-appellant had accompanied him to Coimbatore, it can not be inferred that there was an agreement entered into between them to misappropriate the gold. To constitute a conspiracy, agreement between two or more persons for doing an illegal act, or an act by illegal means, is a sine qua non. Although the agreement among the conspirators can be inferred by necessary implication, the inference can only be drawn

on the parameters in the manner of proved facts, in the nature of circumstantial evidence. Whatever be the incriminating circumstance, it must be clearly established by reliable evidence and they must form the full chain whereby a conclusion about the guilt of the accused can be safely drawn. Even if we hold that at some point of time, the appellant-accused had some knowledge or suspicion about A-3 indulging in fraudulent misappropriation of gold, entrusted to A-3, in the absence of some positive evidence indicating agreement to that effect, conspiracy could not be inferred. On the findings itself arrived at by the High Court, we cannot hold that the appellant-accused was the conspirator to misappropriate the gold, with A-3.

19. On the scrutiny of the entire facts led by the prosecution, the charge of conspiracy cannot stand as there is no link to show that the conspirators agreed to misappropriate the gold while the gold ornament was being prepared.”

(li) In case of **State of Haryana v/s Jagbir Singh and Another, (2003)11 SCC 261,** the Apex Court was dealing with the case squarely based on the circumstantial evidence. The inference of guilt can be justified only when all incriminating facts and circumstances are bound to be incompeteable with the innocence of the accused or guilt of any other person, is the ratio of the above cited decision. Considering the observations and discussion made by the Apex Court in paras 8 to 10 of the said decision, the obligation on the Court is that before holding the accused guilty in a case based on circumstantial evidence, the Court should take each circumstance and should be tested by the touch-stone of law relating to the circumstantial evidence laid down by the Apex Court in the case of **Hanumant Govind Nargundkar and another v/s State of Madhya Pradesh, AIR 1952 SC 343 (1953 Cr.LJ 129).** In the present case, the finding of the

guilt is recorded by the ld. Trial Judge considering the cumulative effect of the circumstances proved. So, while analyzing the factual aspect of the present case, it is possible to state that for a crime to be proved, it is not necessary that the crime must be seen or must have been committed and in all circumstances, be proved by direct occular evidence or each circumstance should be as bright as the direct occular evidence. It is now settled legal position that the Court is supposed to evaluate the circumstances available and proved legally during the course of trial because the offence can be proved by bringing various circumstances on record. It may be only one or more in number, but if they are more in number, a visible chain between these circumstances should exist. The existence of link between the circumstances should look apparent/visible. The principal fact can be held to be established qua the point in issue and that too by consistency in evidence. If the same is put slight differently, the circumstantial evidence is

not the direct to the point in issue, but consistency in evidence qua various other facts which are so closely associated with the fact in issue, which if taken together, form a chain or circumstance from which the existence of a principal fact **can legally be inferred or presumed. (emphasis supplied for the purpose of present judgment).** We can equate a circumstance with a sparkling star analogically. There may be collection of different stars in the sky. A star may give light to the other to the extent that one can say or claim that two stars together are sparkling (twinkling). It is like a constellation. So, the stars in the background of the dark sky may technically not be said to be linked or attached with each other, even then their group may constitute constellation and on concentration or by experience or having a vision, one can easily point out that a particular group of stars is forming a constellation and forming a particular shape and all these stars firstly and apparently

are starring /twinkling in the sky separately and differently, but even then they do form a picture (constellation) popularly known as “Nakshatra”. Merely because some persons like the present accused submit that there is no link in between the circumstances brought on record by the prosecution, but the prosecution simultaneously can equally submit that the Court should try to visualize the link between the circumstance and on attempts, the ld. Trial Judge found that the link between the circumstances exists. On detailed discussion that has been made by this Court in foregoing paragraphs of this judgment qua the facts and points placed before this Court by ld. Counsel Mr. Thakkar as well as by ld. Counsel Mr. Ravani for the CBI and ld. APP Mr. KT Dave, we are inclined to say that the link between the sparkling facts brought on record by the prosecution does form a constellation and the arguments advanced by Mr. Thakkar are not accepted that the prosecution has failed to prove the link between the circumstances that have

come on record during the course of trial because some of the circumstances have either not been proved or have been held proved on the strength of inadmissible evidence. We have ignored the weak part of the circumstances or say the circumstances that have been held proved on inadmissible evidence or inadequate evidence, but the constellation of these circumstances do not dispute the strong link between the circumstances which are capable to realize the existence of constellation or the facts proved. Here, it would be relevant to refer to the observations made by the Apex Court while dealing with the case placed on circumstantial evidence in the case of **Gura Singh v/s State of Rajasthan, 2001 Cri.LJ 487,** Which have been reproduced by this Court in the earlier para of this judgment.

(lii) In the background of the ratio of the decision in the case of **State of Rajasthan v/s Gopal, (1998)8 SCC 449,** and also in the case of **Bakshish Singh v/s State**

of Punjab, 1971(3) SCC 182, even if accepted as good law till date, the same would not go against the prosecution, because in a case based on circumstantial evidence, the circumstances which are the conclusions of the guilt to be drawn, should be fully proved , is the first main condition and such circumstances must be conclusive in nature by itself, is the second condition. Moreover, all the circumstances should be complete meaning thereby each circumstance must be complete and such complete circumstance brought on record should be consistent and should constitute a chain, is the third important aspect and the fourth important aspect is that there should be no gap left in the chain of circumstances. It is obligatory on the part of the prosecution that these circumstances must be consistent only with the hypothesis of guilt of the accused and totally inconsistent with his innocence. As observed by the Apex Court, if the motive is proved satisfactorily in a case based on a circumstantial evidence, then such a proof of motive would supply a

chain of link. **(State of Gujarat v/s Anirudhsingh 1997 Cri.LJ 3397).** Circumstances in the nature of various crystals brought on record, may be having different size, shape and brightness, can get intrinsic thread to form a chain of constellation. So, the substantial success in bringing on record the motive for doing a criminal wrong by leading evidence, oral as well as documentary, makes the prosecution case powerful in saying that the circumstances collected and proved individually and/or collectively, should be viewed with intrinsic thread of motive pleaded and proved because as observed earlier, the motive for doing a criminal wrong generally is a difficult area for the prosecution to prove and one can not normally see in the mind of the others. As observed by the Apex Court in the case of **Nathuni Yadav v/s State of Bihar, (1978)9 SCC 238,** the motive is an emotion which impulses a man to do a particular act. Such impelling cause needlessly and necessarily

be proportionately grave to do a crime. Many murders have been committed without any known or prominent motive and, therefore, there is a scope that impelling factor leading to the accused to a grave offence would remain undiscoverable. This Court has appreciated number of circumstances as discussed in foregoing paras of this judgment and also has tested the strength and clarity of each crystal or circumstance emerging from record ignoring the comments made that are out of the ambit of the settled law, by the ld. Trial Judge. Large number of authorities have been placed before this Court wherein the Apex Court has decided the cases based on different facts situation wherein the prosecution cases are resting on circumstantial evidence, but it is not necessary to comment on each decision when the observations made in the cited decisions have been kept in mind while evaluating the evidence as well as rival submissions."

62. This case was also based on circumstantial

evidence and it was argued before the Court that there are different circumstances even not effectively proved and the prosecution has failed in establishing the chain of circumstances linking the accused with the crime.

63. According to us, no other view is possible in the present case than of guilt of the accused persons. The prosecution has satisfactorily proved its case beyond reasonable doubt that the deceased on early hours of 20.2.1984 was done to death by gun shot injury. In furtherance of the motive that was there in the mind of the accused and after lapse of some hours two out of three accused persons brought the dead body to the V.S.Hospital under the pretext as if they are taking the injured to the hospital. The story as to the injury found on the dead body received by Ellisbridge Police Station was ultimately found false.

64. It is true that there is no evidence as to the conspiracy between accused nos.1 and 3 on one hand and accused no.2 on the other. So, it would not be safe for the Court to convict all the accused for the offence punishable under Section 302 read with

Section 120-B of I.P.C., on the totality emerging from the record but there is sufficient evidence to convict accused nos.1 and 3 for the offence punishable under Section 302 read with Section 34 of I.P.C., as they were sharing intention unless accused no.2 had abetted the crime by joining them and providing accused nos. 1 and 3 with the weapon and in disappearing from the picture when the deceased was brought to the V.S.Hospital with weapon. So, accused nos.1 and 3 were able to fulfill their intention by an act of abetment of accused no.2. So, according to us, there is sufficient evidence to link accused no.2 with the crime and is found guilty of the offence punishable under Section 302 read with Section 114 of I.P.C.

65. It is important to note that accused nos.1 and 2 were defended by the same advocate and both of them had placed common defence. So, it can reasonably be inferred that accused nos.1 and 2 had conflict of interest. Of course, this aspect would not add any strength in the case of the prosecution but before this Court accused nos.1 and 3 have argued separately as if there is no conflict of interest between them. There is ample possibility that accused no.2 may not

be knowing even that accused nos.1 and 3 shall come to his house and impress upon him to join them that too with a gun but it was not impossible for accused no.2 to assess the intention of accused nos.1 and 3. The willful negligence of criminal nature makes a person abetor. It may be an act of omission also but the status of accused no.2 would remain of abetor and totality of the evidence was required to be appreciated in that perspective where the trial Court committed a grave error.

66. There is neither evidence nor any specific case as to the commission of offence punishable under Sections 392 and 394 of I.P.C. Muddammal that has been recovered from the motor car and produced before the Court is suggestive of one fact situation that the offenders had not made any attempt even to commit the offence punishable under Sections 392 or 394 of I.P.C. Section 392 prescribes the punishment for robbery and Section 394 prescribes the punishment for graver offence wherein the prosecution is supposed to prove that the accused had voluntarily caused hurt in committing or attempting to commit robbery or any other person jointly concerned in such robbery. Here in the present case, the prosecution has attempted to

prove that there was some hidden motive in the mind of accused nos.1 and 2 and it is satisfactorily established by the prosecution that to satisfy the motive accused nos.1 and 2 used the person and weapon of accused no.2 and had committed the offence. It is an attempt by the prosecution and they have succeeded in establishing substantially that this hidden motive was to avoid financial liability that they were owing to directly or indirectly to deceased Firozbhai. As we have observed earlier that in a given case based on circumstantial evidence, the prosecution is not under the obligation to prove motive or at least to prove such motive in a satisfactorily manner it would be sufficient for us to say that the charge framed not against the accused persons for these two offences i.e., punishable under Section 392 and 394 of I.P.C., remained unestablished. So, the order of acquittal would not disturb the effect of acquittal qua the charge of these offences.

67. As per charge Exh.7, accused no.2 with accused no.1 has committed the offence punishable under Section 25(1)(a) of the Arms Act. It is proved beyond doubt that out of three accused, the evidence against accused no.1 is sufficient to prove that he

is the person who must have fired the gun, otherwise, his hand would not have been found the presence of nitrate which was detected by the FSL on analysis of the hand wash taken of accused no.1. So, accused no.2 who was authorized to hold the weapon had permitted accused no.1 by handing over his licence gun for illegal use and accused no.1 though was not authorized to use the fire arm had used the fire arm. According to us, there is no evidence which can be said to be of convincing nature for hatching the conspiracy. Looking to the story placed by the prosecution, on the contrary, reveals that hatching of conspiracy in advance probably was not that easy or possible because the things were otherwise resting on the incident that was met in the presence of the accused by the deceased. The deceased if would have agreed not to go to Savarkundla on that day and would have shown some lethargy as to recovery of the dues from Savarkundla customers to whom the tyres were sold at the instance of accused no.3, the incident would not have even occurred and accused no.1 and 3 even would not have gone to house of accused no.2. It is true that as per the settled legal position, the prosecution is not supposed to establish the element of conspiracy by leading cogent evidence. In a given

circumstance, conspiracy can be inferred from the evidence led by the prosecution and the conduct of the accused prior to the incident and subsequent thereof because conspiracy is being hatched in a secrecy but at least the prosecution should bring the evidence of existence of conspiracy at the time of commission of the offence. Any attempt made to disappear the evidence by itself would not be sufficient to infer conspiracy because in number of cases the accused are attempting to see that the evidence against them disappear or destroy. In all such cases, the presence of conspiracy cannot be inferred. The mitigation of minds of the accused itself does not constitute conspiracy. The intention can take birth in spur of moment or in couple of moments. In that background of legal situation, the scheme of Section 120-B should be kept in mind before linking the accused with the crime as conspirator. In the present case, the element of presence of conspiracy has not been proved to the satisfaction of the Court. However, even in absence of formal charge of the offence punishable under Section 34, the accused person can be convicted. Considering the classes of offences which are made punishable under the Indian Penal Code, the offence punishable under

Section 34 is a different class of offence than of conspiracy and it will be true to say that the offence punishable under Section 34 cannot be said technically lesser offence than the offence punishable under Section 120-B of I.P.C. We are of the view that a person who is charged for the offence punishable under Section 120-B is capable to assess the nature of charge and basic substance of the allegation /impeachment made against. So it cannot be argued or submitted by the accused that in absence of the charge of the offence punishable under Section 34, he cannot be punished for the offence as the original charge framed is of Section 120-B of I.P.C.

68. As mentioned in earlier para, there is sufficient evidence to show that accused no.2 had handed over his gun to accused no.1. He was not authorized to do so. This amounts to transfer of weapon to unauthorized person which is made punishable under Section 25(1)(a) of the Arms Act. It is not necessary to prove by the prosecution that a person who is using the arm had purchased the arm before using it for some reasonable period of time. One can use the weapon fire arm only if he possessed. So, taking the possession of the fire arm from

accused no.2 by accused no.1 was the offending act. In the same way, the use of it is also another wrong committed by accused no.1. It is not possible for the prosecution to prove that who loaded the gun with live cartridge in the situation in which the present crime has been committed in the present case but it is not necessary to bring such part of evidence. But, in the sequence of events, legitimately inferable from the evidence discussed above, accused nos.1 and 2 can be said to have committed the similar offence qua ammunition i.e., cartridge used at the time of firing of muddamal gun. So, according to us, accused nos.1 and 2 have committed the offence punishable under Section 25(1)(a) of the Arms Act. Learned trial Judge has acquitted the accused persons and specially accused nos.1 and 2 from the charge of the offence punishable under the Arms Act on the strength of the inference that accused no.2 was authorized to hold the gun and muddamal gun might have went wrong and the deceased might have sustained injury on account of accidental fire. It is interesting to note that this inference itself links accused no.2 with the spot of the incident otherwise, learned trial Judge could have held at least accused no.2 guilty of the charge of the offence punishable

under the Arms Act for parting with the gun to a person or persons unauthorizedly and accused nos.1 and 3 could have been linked with the crime punishable under Section 25(1)(a) of the Arms Act. Therefore, according to us, there is sufficient evidence to establish the charge of offence punishable under the Arms Act against the accused nos.1 and 2 and therefore, they are held guilty of the charge punishable under Section 25(1)(a) of the Arms Act.

69. In view of this finding, the appeal of the State is allowed. Accused nos.1,2 and 3 are not required to be heard on the point of quantum of punishment so far as the offence punishable under Section 302 read with Section 34 so far as accused no.1 and 3 are concerned and accused no.2 for the offence punishable under Section 302 read with Section 114 of I.P.C., is concerned because we are not inclined to impose the extreme penalty prescribed for the offence. The minimum punishment is life imprisonment for commission of the offence of murder and there is no distinction in the quantum of punishment between the actual murderer and the accused sharing the intention with him or abets the

crime punishable under Section 302 of I.P.C. So, all three accused are ordered to undergo rigorous imprisonment for life. The bail bonds executed by the accused persons stand cancelled.

70. So far as the offence punishable under Section 25(1)(a) of the Arms Act is concerned, the quantum of punishment prescribed is flexible and the Court can sentence the accused to undergo imprisonment for a term between three years and seven years and also with sentence of fine. So, the Court now shall have to hear accused nos.1 and 2 on the point of quantum of sentence. Registry, therefore, is directed to issue non-bailable warrant with intimation to jail athority, if need be and the accused persons be brought before this Court on 10th January, 2007 so that they can be accorded opportunity to submit on the point of sentence for the offence held proved punishable under the Arms Act. The trial Court and the officer of the concerned police station may be intimated about the order for appropriate compliance.

(C.K.Buch,J) (Sharad D.Dave,J)

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